No. 3057

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,
Plaintiff in Error,

vs.

MATILDA C. NEASHAM,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Brief for Plaintiff in Error.

This case was commenced by defendant in error, hereinafter referred to as plaintiff, against plaintiff in error, hereinafter referred to as defendant, to recover upon a life insurance policy the sum of $10,000 and interest; verdict and judgment for plaintiff; motion for new trial denied; hence writ of error from final judgment.

STATEMENT OF THE CASE.

Plaintiff's complaint alleges: That on July 10, 1914, defendant, in consideration of the payment of the annual premium of $456.90, executed and delivered its policy of life insurance on the life of plaintiff's husband, William C. Neasham, in the sum of $10,000, which policy marked Exhibit "A" was attached to and made a part of the complaint; that on

February 27, 1915, the insured died; that plaintiff furnished defendant with due proof of the death; that at the time the policy was issued and at the time of death, plaintiff was the wife of the insured; that plaintiff has performed all the conditions of the said policy on her part to be performed; that defendant has not paid said sum of $10,000, or any part thereof. Wherefore plaintiff demands judgment for $10,000 and interest.

The said contract, Exhibit "A" to the complaint, contains, *inter alia,* the following:

> "SELF-DESTRUCTION:—In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more." (Tr. 1–5.)

To the complaint defendant demurred and moved to have the complaint made more specific and certain for grounds stated in the demurrer and notice of motion (Tr. 6–8); the demurrer and motion were denied (Tr. 9).

Defendant's amended answer puts in issue all material allegations in plaintiff's complaint. It specifically denies that by the terms of said policy it "promised or agreed to pay the plaintiff $10,000 upon due proof of the death of said William C. Neasham. And in that behalf, the defendant alleges that in and by the terms of said policy, in the event of self-destruction during the first insurance year, whether the insured was sane or insane, the

insurance under said policy shall be a sum equal to the premiums thereon which have been paid to and received by the defendant, and no more." That the insurance year commenced July 10, 1914, and that during the first insurance year, on February 27, 1915, said Neasham, the insured, "destroyed himself, and then and there died as the result of a *self-inflicted gunshot wound";* that defendant, upon receipt of due proof of death, became by the terms of said contract obligated to pay a sum equal to the premiums thereon which had been paid to and received by the defendant, and no more; that no premium had been paid; defendant admitted that it did not pay the $10,000 or any part thereof, and denied that said sum or any sum or amount was due plaintiff, and denied that it was indebted to plaintiff in any sum or amount whatsoever.

For an affirmative, separate defense, defendant in its amended answer set forth,—the execution of the policy, containing the "self-destruction" clause; that the insurance year commenced July 10, 1914, and that the insured February 27, 1915, was discovered dead, with a *gunshot wound in the roof of his mouth;* that said Neasham on February 27, 1915, *"destroyed himself,* and then and there died as the result of a *self-inflicted gunshot wound,"* and alleging no liability except a sum equal to the premium paid, and that no premium had been paid; hence no liability. (Tr. 9–13.)

Plaintiff's reply, *inter alia,* puts in issue the allegations of new matter in defendant's answer. At paragraphs II and V plaintiff says:

"Plaintiff denies * * * that said William C. Neasham, either *destroyed himself,* or either then or there died as the result of a *self-inflicted* gunshot wound, and in this behalf *plaintiff alleges* that her husband, * * * *came to his death* on February 27th, 1915, *at the hands of some person or persons unknown to plaintiff.*" (Paragraph II.)

"And for a further reply * * * plaintiff alleges that her husband, * * * came to his death on the 27th day of February, 1915, *from a gunshot wound* inflicted upon him at the hands of some person or persons unknown to plaintiff." Paragraph V. (Tr. 14–16.)

Under the pleadings and the issues thus joined, the case went to trial.

During the opening statement by plaintiff's attorney, the following appears:

"The COURT.—I think it would be in order, Mr. Kepner, for you to outline briefly to the jury what you expect to prove to maintain your case; you forgot it, perhaps, by stating the pleadings.

Mr. KEPNER.—If your Honor please, the position I take is, in order to maintain and establish the case, is proof of the facts which I have outlined.

The COURT.—Well, perhaps you are right about that. You see, it is not admitted that the deceased died, so your evidence will have to show his death, *and that will involve showing the means by which he died.*

Mr. KEPNER.—Showing that he died?

The COURT.—Yes.

Mr. KEPNER.—I think, if your Honor please, we are anticipating just a little perhaps. Under the terms of the policy, death is the only thing we have to prove; and we will prove death. I might state, in order that the jury may understand the form that this controversy will take, that the defendant, as I understand it, will contend that the insured died by his own hand, or by his own act; the plaintiff on her part, will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons *other than the insured.* I think, if your Honor please, that is all I care to state at this time." (Tr. 75.)

Plaintiff to establish the issues thus made testified in her own behalf (Tr. 76 et seq.) to the effect—that she is the widow of Neasham, deceased, the insured; that the insured died February 27, 1915; the policy, Exhibit "A" to the complaint, is identified and offered in evidence as Plaintiff's Exhibit "A" (Tr. 77, 306); that subsequent to the death of the insured proofs of death were furnished, said proofs of death being identified and offered and admitted in evidence as Plaintiff's Exhibit "B" (Tr. 82, 308–313); that no objections to the sufficiency of the proofs of death were made by defendant so far as plaintiff knew; that the policy has not been paid. There was no cross-examination of plaintiff and plaintiff rested. (Tr. 84.)

At the conclusion of plaintiff's testimony, defendant interposed a motion for a nonsuit and to direct a

verdict; said motion appearing at Tr. 84-87, and is as follows:

"Comes now the defendant, New York Life Insurance Company, by its attorneys, at the conclusion of all the evidence offered by the plaintiff herein, and moves the Court for a nonsuit, and to direct a verdict for the defendant upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of ten thousand dollars as the amount of the insurance under said contract, Exhibit 'A' to the complaint herein. Said motion is made upon the grounds and for the reasons as follows, to wit:

1. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit 'A' attached to and made a part of the complaint.

2. That it appears from the face of the complaint:

(a) That in event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.

(b) That the first insurance year under said contract, Exhibit 'A' to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

(c) That the insured, William C. Neasham,

during said first insurance year, and on to wit, the 27th day of February, 1915, died.

(d) That by the terms of said contract, Exhibit 'A' to the complaint, the amount of the insurance thereunder is fixed and determined by the facts applicable thereto, as therein stated; and the amount plaintiff would be entitled to receive as the amount of insurance under said contract upon the death of the insured, William C. Neasham, depends upon the fact, did or did not the insured, William C. Neasham, destroy or kill himself.

(e) That said insured, William C. Neasham, may have killed or destroyed himself, in which event the insurance under said contract, Exhibit 'A' to the complaint, was not ten thousand dollars, but was the sum of $456.90, and no more.

3. That plaintiff's pleadings and proof establish, among other things, the following facts, to wit, that the insured, William C. Neasham, came to his death from a gunshot wound; that said gunshot wound was of the head and brain, and that death was instantaneous.

4. That to entitle plaintiff to recover said sum of ten thousand dollars as the amount of the insurance under said contract, Exhibit 'A' to the complaint, it must be made to appear as a fact that the insured, William C. Neasham, is dead, and that his death was from some cause by reason of which, under the express terms of the contract, plaintiff is entitled to receive the said ten thousand dollars. That while it is ad-

mitted in the pleadings and established by plaintiff's proof, that the insured, William C. Neasham, came to his death from a gunshot wound, there is no proof of any fact from which it can be determined that said insured, William C. Neasham, did not destroy or kill himself.

5. That plaintiff has failed to establish the material fact alleged in paragraph four of the complaint, and denied in paragraph three of the amended answer, that plaintiff furnished defendant with due proof of the death of the insured, William C. Neasham; that the proofs of death offered in evidence by plaintiff do not constitute due proof of death as is required by the contract, Exhibit 'A' to the complaint, in that it appears from said proofs of death that the insured came to his death from a gunshot wound of head and brain, and that death was instantaneous, but it does not appear therefrom whether the insured did or did not destroy himself; and inasmuch as defendant's obligation under the contract, Exhibit 'A' to the complaint, in case of self-destruction during the first insurance year was for a sum equal to the premiums thereon paid to and received by the company, and no more, and that the premium was not ten thousand dollars, and does not exceed $456.90, the extent of defendant's obligation could not be determined from the proofs of death in evidence as proofs of death furnished by plaintiff to the defendant company.

6. That plaintiff has failed upon the trial to prove a sufficient case for the Court and jury, in so far as plaintiff seeks to recover a judgment in the sum of ten thousand dollars as the amount of the insurance, and said amount being one of the sums specified in said contract, Exhibit 'A' to the complaint, to be paid to plaintiff as the amount of the insurance upon the establishment of certain facts; but the facts essential to plaintiff's right to recover said sum of ten thousand dollars under said contract, Exhibit 'A' to the complaint, as the amount of the insurance, have not been established by plaintiff's evidence."

After argument, the motion was denied, exceptions reserved for the reasons stated in the motion and the grounds therefor.

The Court having denied its said motion, the defendant, to meet the burden cast upon it by the ruling of the Court, offered testimony to establish the allegations of defendant's amended answer.

That the insured *came to his death from a gunshot wound* February 27, 1915, and *within the first insurance year* is an uncontroverted, established fact. It is alleged in and admitted by the pleadings; it is established by plaintiff's proof and by defendant's proof interposed for the purpose of establishing that the insured destroyed himself.

The issue of fact remaining undetermined, under the ruling of the Court denying the motion above mentioned, was whether or not the insured *shot himself,* as maintained by defendant, or whether the insured came to his death from a gunshot wound in-

flicted upon him by some person or persons unknown,—some person or persons *other than the insured,* as maintained by plaintiff.

The proof established without contradiction certain facts which in chronological order are as follows:

Plaintiff, as a witness for defendant (Tr. 148), testified that she saw deceased Friday evening about six o'clock; the next time she saw him was Saturday morning before his death, but she did not know whether or not deceased stayed at home Friday night.

About six o'clock Friday evening deceased purchased a 32-Savage automatic pistol, and asked and was shown how to load and work it, and when told by the party selling the pistol to him that he did not have enough shells to fill it, insured said "there would be plenty" (Tr. 111, 112).

The coroner, undertaker and sheriff upon arriving at the place where Neasham's body lay dead or dying in the gravel-pit the following morning between ten and eleven o'clock, found on the ground and within from three to eight inches from the right hand of deceased a 32-Savage automatic pistol, with *eight loaded shells in it and one empty 32 caliber shell* close by his side; this pistol and shells were preserved and admitted in evidence as Defendant's Exhibit 1, and the pistol was identified as being the pistol sold to the insured about six o'clock the evening prior to the morning of insured's death (Tr. 101, 127–128, 151–155, 157).

Hammersmith testified that he saw insured walking down the railroad track alone towards Sparks

from Reno between 8:15 and 8:45 on the morning of his death (Tr. 89).

All the testimony is, and it was testified to by several witnesses, that the character of the ground in the gravel-pit or cut was sandy, damp and showed all tracks distinctly and clearly; that there was only one line of tracks or footprints leading to the body where it lay on the sloping bank of the gravel-pit or cut; that there were no other footprints or tracks nearer to the body than eight to ten feet, than the one line of tracks leading to the place where the body lay; that deceased's hat lay on the ground perhaps ten inches from the head, to the right side; that the clothing of the deceased was in perfect order and not dishevelled in any way or manner; that there was no cut, bruise or abrasion of the skin, contusion of any kind upon the body, except wound in the back of the mouth and in the back part of the head; that the teeth were intact, the tongue was not injured, nor the lips bruised or marred or injured in any way whatsoever; that there was no blood upon the deceased except in the mouth and nose and upon the right-hand coat sleeve; that the only wound was far back in deceased's mouth, and so located as not to be visible except by pressing down the tongue, and a stellar-shaped fracture, a piece of bone pushed *out* beyond the surface of the contour of the bone of the occipetal protuberance; that the stellar-shaped fracture was back and a little upwards from the entrance or beginning of the wound in deceased's mouth.

Sheriff Ferrell, testifying concerning injuries, said: "A. I found an injury through the

mouth in the back part—in the head. Q. Did you see any other injuries on him? A. I didn't find any other. Q. Can you state the nature of that injury that you refer to through the mouth? A. You mean what had caused it? Q. Yes. * * * Witness. The injury, I would describe it as a blow-out from concussion. Q. You are speaking now of the external injury? A. *There was none outside; it was through the mouth*, but toward the back of the head, like concussion, tearing quite a large hole, and carrying everything in front of it, caused by the explosion of the shell fired from the gun." (Tr. 159–161.)

Dr. Gibson, county physician, who performed the post-mortem autopsy, testified that he found a wound on the right side of the throat, penetrating, and also a fracture of the back part of the skull; that he introduced his finger into the throat and found a wound, could touch fractured bone in the wound; that he found the posterior part of the skull prominent, removed the scalp and found a stellated fracture, and a piece of the bone pushed out beyond the surface of the contour; that he did not go into the cavity "because his brother-in-law was there, and he requested me not to cut the body any more than I had to"; that he found out what was the cause of the death, and that the wound described would produce immediate death; that neither the tongue, lips nor teeth showed any injury. (Tr. 193–198).

Dr. Morrison, after being referred to the testimony of Dr. Gibson describing the character and

location of the wound and the fact that neither the teeth, tongue nor lips were injured, gave it as his opinion that the wound could not have been inflicted except the instrument causing the wound *was in the mouth* of the deceased. The Doctor was then asked, "Explain why it could not," to which he answered:

> "A. A wound of that description would have to be caused by—if it was done by a gun, by the gun being in the mouth, or the tongue would be pierced by anything coming in through the mouth, and possibly the lips; or the teeth knocked out; it would not be possible to have a wound of that kind otherwise, except in the act, as Doctor Gibson says, of yawning or gagging, and very improbable then; because even if the tongue was out of the way, to get a wound coming from the outside,—well the mouth doesn't open so far as that [referring to skull used for illustration] and the soft part is below that; you would not get the range, unless you hit the hard palate, and the hard palate was not hit." (Tr. 210–211.)

Mr. Burke, witness for plaintiff in rebuttal, ex-Chief of Police of Reno, ex-Sheriff of Washoe County, ex-Superintendent of State Police, at Tr. 233, testified that he examined the body at the undertaker's and that the only wound he saw was the one in the mouth.

> "Q. Did you notice any other injuries of any character? A. I did not."

Examining the record more in detail and giving the evidence in a narrative form in reference to subjects, it appears from the record,—

A Gunshot Killed Neasham.—This is asserted and proved by plaintiff and stands uncontroverted. Defendant alleged in its amended answer that Neasham died as the result of a self-inflicted gunshot wound (Tr. 12). Plaintiff in her reply alleged that Neasham died from a gunshot wound inflicted upon him at the hands of some person or persons unknown to her (Tr. 16). The proofs of death introduced in evidence by plaintiff state that Neasham died from a gunshot wound of head and brain (Tr. 82, 311). There is no evidence that his death was from any other cause, and the plaintiff's only claim, as disclosed by the record, is that this gunshot wound was not inflicted by Neasham, but was inflicted by some person or persons other than the insured (Tr. 14, 16, 75).

Neasham, Farmer, Ranchman and Stockman, 48 Years Old (Tr. 309, 311, 313), Physically Powerful (Tr. 179, 180, 203), Received the Gunshot Wound of Head and Brain in Broad Daylight About 10 o'clock A. M.

8:30 o'clock Saturday morning, February 27, 1915, insured's wife last saw him alive (Tr. 148). 8 to 9 o'clock that morning, Verdi Peterson, a laborer, knowing insured for more than twenty years, met and talked with him on the streets of Reno (Tr. 276, 277). 8:15 to 8:45 o'clock the same morning, insured, walking along the Southern Pacific Railway tracks easterly from Reno towards Sparks, while

about two city blocks east of the company's Reno depot was seen by George N. Hammersmith, a switchman, who had known him eight or ten years (Tr. 88–92). 2½ to 2¾ miles east of this place where he was between 8:15 and 8:45 (Tr. 93), insured was discovered about ten o'clock that morning dead or dying about sixteen feet south of the Southern Pacific tracks in an open cut, parallel thereto (Tr. 317, 318). 10 to 11 o'clock the same morning, C. P. Ferrell, Sheriff of the county, having been notified of the body's discovery, accompanied by F. K. Unsworth, the coroner, and F. O. Chick, the undertaker, arrived in an automobile at the scene (Tr. 164, 165, 180). About ten o'clock that morning Peterson heard of Neasham's death.

No Evidence of Robbery—Evidence Conclusively to the Contrary.

The unimpeached and uncontradicted testimony of Coroner Unsworth is that he, examining the body before it was disturbed, found on it $2.50, purse, gold watch, chain and charm, stick-pin, fountain-pen and other articles (99, 100).

32-Caliber Savage Automatic Pistol, Purchased by Neasham About 16 Hours Before His Death and Then Loaded With Nine Cartridges, Found Near Body Loaded With Only 8 Cartridges and Near an Exploded 32-Caliber Cartridge.

When the body was discovered, the uncontradicted testimony of the five witnesses who testified on the subject is that there lay from three to eight inches of his right hand a 32-caliber Savage automatic pistol (96–100, 116, 122, 152, 155, 156, 172). That

the pistol then contained only 8 loaded shells is also conclusively proved.

Sheriff Ferrell, first to approach the body (95) picked up the pistol (104, 106, 151) and handed it to Coroner Unsworth (151), who examined it (106, 108) and a moment later handed it back to the sheriff (105, 106, 151), telling him to keep it until the coroner should call for it (105). The pistol when picked up, the hammer was back and a loaded cartridge in the chamber, the magazine contained shells (156, 157). It was thereafter locked in the sheriff's safe (157), remained in the sheriff's possession until, at the coroner's inquest two days later, Monday, March 1st (105), he delivered it to the coroner (157). In the meantime he had done nothing to the contents of the pistol except to remove the magazine which contained shells (156, 157) and a shell from the chamber (157). All of these, contained in the pistol when handed back to him by the coroner when they first viewed the body, he delivered at the inquest to the coroner (157). The coroner retained possession of the pistol and the shells from the time he received them at the inquest until he delivered them to Harry Hill, the county treasurer, a day or two after the inquest (101, 106, 127). When the county treasurer received them he and the coroner made a memorandum of the number on the pistol (106) which was "54589 (R)" (106, 107). The sheriff about a half hour after he picked up the pistol made a memorandum of the number on it (155). The coroner, when the pistol was handed to him by the sheriff when they first viewed the body, read the number on the pistol

(107, 108). At the trial the county treasurer produced the pistol and shells, in the same condition they were in when he received them from the coroner, and they were introduced in evidence (128). The number on the pistol was 54589 (R). The sheriff identified the pistol as the one he had picked up by the body (155), and the one he had delivered to the coroner at the inquest (157); the coroner likewise identified it (100, 107, 108). The pistol and contents picked up by the sheriff and coroner were the pistol and contents passed to the county treasurer, and by the county treasurer to the Court.

The shells produced at the trial by the county treasurer and received in evidence (128) were nine—*eight loaded and one empty* (127).

The Empty Shell.

When they first viewed the body, the coroner picked up an empty shell, 32-caliber, beside the body (101), kept it a moment or two and then handed it to the sheriff (105) directing him to keep possession of it until the coroner should call for it (105, 106); that the coroner then turned over to the county treasurer with the pistol an empty shell which looked like the one he had picked up and given to the sheriff, which he believed the sheriff delivered to him at the inquest and which the county treasurer produced at the trial (127). A 32-Savage automatic pistol when discharged automatically throws out the exploded shell replacing it in the chamber with a loaded shell (129, 248).

The Pistol Was Purchased by Neasham About Sixteen Hours Before It was Found Lying Near

His Body and When Purchased It Contained Nine Loaded Shells.

About 6 o'clock Friday evening, the day before his death, Neasham went to the store of Frank Collins to buy a pistol (111, 112, 130), and Collins, who waited on him, knew and recognized Neasham (111) and, seeing his body at the morgue the next day, recognized it as that of Neasham on whom he had waited at his store the day before (113). Collins showed Neasham a 32-caliber Savage automatic pistol (112), marked with a steel punch on the top of the magazine (141) and otherwise distinguishable on account of the tightness with which cartridges fitted into its magazine (143). The pistol when fully loaded held ten cartridges—nine in the magazine and one in the cylinder or chamber (112).

Neasham did not understand the pistol's mechanism (128, 129), so Collins loaded it for him and explained to him how it worked (128, 130). Had Collins put ten cartridges in the pistol, he would have inserted one in the chamber and nine in the magazine, as the magazine could hold only nine (112). But Collins testified that he delivered the pistol to Neasham loaded and that Neasham under his instructions worked the pistol so as to throw a cartridge into the cylinder (130). Had there been more than nine cartridges in the pistol, the cylinder would have been occupied and Neasham could not have thrown a cartridge into the cylinder. Collins testified that there were nine shells in the pistol when Neasham bought it (112, 130)—eight in the magazine and one in the barrel—that he called Neasham's attention to the

fact that there was one cartridge short (113). Collins at the trial identified the pistol there introduced in evidence as the pistol he sold Neasham (128).

The Missing Cartridge and the Empty Shell.

Missing from the pistol found near the body was one 32-caliber cartridge which was in the pistol about sixteen hours before.

Lying by the body was an empty 32-caliber shell near the 32-caliber pistol (101, 105, 106, 127). Had the pistol been discharged, it would automatically have thrown from its chamber an empty 32-caliber shell (129, 248).

Nine Cartridges in the Pistol Were Plenty to Serve Neasham's Purpose in Purchasing the Pistol.

When Collins, selling the pistol to Neasham, told him it contained only nine cartridges and he did not have enough shells to fill it, Neasham replied there were plenty (112, 113). There is no evidence tending to show that there was anyone from whom Neasham feared injury or toward whom he held animosity. Had there been such a person his widow would probably have known it and it would have been to her interest to disclose it at the trial. Yet, although she was three times on the witness-stand (76, 147, 281), nothing on the subject was elicited from her. Whatever Neasham's purpose was in buying the pistol sixteen hours before his death, it was a purpose to fulfill which he was satisfied nine cartridges in the pistol—one in the barrel and eight in the magazine—"were plenty." Had he apprehended an attack upon him, would he have regarded them as

plenty? What was this purpose in his mind which he was satisfied nine cartridges in the pistol were ample to execute?

Defendant's Exhibit 4, referred to in "Stipulation and Statement In Re Printing Record," at p. 332, "is certified by the county clerk as containing and comprising true, full, perfect and complete copies of 'Inventory and Appraisement,' 'Petition for Sale of Real Estate' and 'Order of Sale of Real Estate,' In the Matter of the Estate of William C. Neasham, Deceased," from which said documents it appears that deceased's estate was insolvent, that the real property was appraised at a total value of $25,000, all personal property that came into the hands of the administratrix at a total value of $7,630.67; that all the property of the estate is community property; thus leaving as estate property total appraised value amounting to $16,315.38½; that claims paid and unpaid which had been allowed and approved, including balance due on purchase price of some of the real estate amounted to the sum of $24,721.60; that there was in addition to this the approximate debt of $1,000, and in addition to that the sum of $100 per month for the family maintenance; that it became necessary to secure an order of Court to sell the real estate to pay the debts of deceased.

Neashum Absent from Home the Night Immediately Preceding the Morning of His Death.

In his cross-examination, Neasham's son admitted that he testified at the coroner's inquest two days after his father's death that his father was absent from home the night immediately preceding his

death (125). Mrs. Neasham testified that she did not know whether her husband was home or not, that Neasham might have slept upstairs (148). The son testified that he slept that night upstairs (126) and he, in a position to know the fact, admitted he had testified positively at the coroner's inquest that his father was not home that night (125).

Pistol Inserted in Neasham's Mouth When Fired.

a. The record discloses no dispute as to the location of the wound. The only witnesses who examined the wound were the undertaker, the county physician, the coroner and the sheriff. They examined the body at the undertaker's parlors where it had been removed on the day it was discovered (173). The wound could not be seen (173, 202), because the tongue obstructed the view and could not be sufficiently depressed to make the wound visible (202). But the wound was found (175, 193) by running the finger into Neasham's mouth way back to the right side of the entrance to the throat just a little above the protuberance which hangs down in the throat, and inserting it into the entrance of the wound at that point (175, 193, 196). The shot entered the soft palate and did not cut the hard palate above (196). The shot took a slightly upward course toward the back of the head, for Dr. Gibson, county physician for seven or eight years (192), who had practiced medicine for about thirty-five years (191) and had known Neasham for thirteen or sixteen years (192), and who performed the autopsy on his body (192), testified that to the right of the lower portion of the back of the skull slightly

above the entrance of the wound in the mouth at the right of the throat, he found a star-like fracture of the skull forced and driven out from the inside (193–196, 206).

A shot fired from a gun held outside Neasham's mouth could not have made the wound at the point this shot did. The soft palate at the place pierced by the bullet was below any point at which a gun held outside the mouth could have been aimed even if the mouth had been open as far as it could go. Dr. Morrison, physician and surgeon for fourteen years, county physician for ten or twelve years, experienced in making autopsies and caring for gunshot wounds (206, 207), testified:

> " * * * to get a wound coming from the outside—well, the mouth doesn't open so far as that [referring to skull used for illustration] and the soft part is below that; you would not get the range, unless you hit the hard palate, and the hard palate was not hit" (211).

b. Neither the lips nor the teeth (173, 197) nor the tongue (197) showed any evidence of injury. The hard palate was not cut (196). This, the testimony of the undertaker and Dr. Gibson, is undisputed.

Dr. Gibson testified *it is inconceivable* that the wound could have been produced by a shot fired from a gun held *outside* Neasham's mouth without injuring the lips, teeth or tongue unless the mouth were open, as in the act of yawning, retching or crying out in agony in a hoarse and low-pitched voice *and also unless the tongue were depressed.* But that the

tongue could thus have been depressed is highly improbable, if not impossible, for, added the doctor:

> "In examining the body I tried to look to see the wound through the mouth by depressing the tongue, and I could not do so. *I could not depress the tongue. The tongue obstructed the wound and I could not press it down far enough to see the wound, I tried it"* (202).

And Dr. Morrison testified (211):

> "A wound of that description would have to be caused by, if it was done by a gun, *by the gun being in the mouth,* or the tongue would be pierced by anything coming in through the mouth, and possibly the lips; or the teeth knocked out."

And then he qualified this statement by adding:

> "Except in the act, as Doctor Gibson says, of yawning or gagging, *and very improbable then."*

And then he in effect struck out this qualification, by continuing:

> "Because even if the tongue was out of the way, to get a wound coming from the outside—well, the mouth doesn't open so far as that and the soft part is below that; you would not get the range unless you hit the hard palate, and the hard palate was not hit."

So both doctors in substance agreed that the place in the soft palate way back in the mouth at the right side of the entrance to the throat where the shot penetrated was so obstructed by the tongue that it

could not have escaped injury had the shot been fired from a gun held outside Neasham's mouth.

c. It is established that the entrance of the wound was quite a large hole (161), so that the middle finger of the undertaker—three-quarters to five-eighths inches in diameter—could be and was inserted into it (175, 176, 184); that it was not a clean-cut entrance, but was ragged, containing fractured bone (197) and torn by concussion from the explosion of a cartridge carrying everything in front of it to the back of the skull, which was puffed out (161) in the form of a star-like fracture (206).

Such a wound could not possibly have been produced by a shot fired from a gun held outside Neasham's mouth. It bore all the characteristics of a wound from a shot fired from a gun held against the objective when, according to the testimony, "the bullet enters, the gas is discharged, and the powder and so forth blows in the soft tissues, leaving a jagged, large crater-like opening" (208). It bore none of the qualities of a wound from a shot fired from a gun at a distance from the objective when "the entrance of the wound almost universally is the size of the bullet" (209), and therefore is clean-cut.

d. Lalonde, who discovered the body, must have been near when the shot was fired, but he heard no report (116). With the muzzle of the pistol back in the mouth, the report would be muffled. Neasham's death was practically instantaneous (310, 311, 198). When Lalonde discovered the body Neasham was still breathing (114, 116, 121, 122) and shortly thereafter when the sheriff, coroner and un-

dertaker arrived the heart was pulsating slightly (176). Lalonde discovered the body about ten o'clock (115); the news of Neasham's death reached Reno about ten o'clock (278). Lalonde must have been near when the gun was fired; yet he heard no report. Why? Because the gun was thrust way back in Neasham's mouth and the report was muffled.

The Shot not Accidentally Fired by Neasham—*There was no issue of accidental shooting.*

If Neasham fired the shot, he did so intentionally. Intentional shooting is alleged in the pleadings. Defendant in its answer alleges that Neasham "destroyed himself, and then and there died as a result of a self-inflicted gunshot wound" (10, 12). Plaintiff met the allegation by denying it and by averring in her reply that "Neasham * * * came to his death * * * at the hands of some person or persons unknown to plaintiff" (14). "And for a further reply" * * * that he "came to his death * * * from a gunshot wound *inflicted upon him* at the hands of some person or persons unknown to plaintiff" (16). The allegations by plaintiff are that Neasham did not kill himself, and that some other person killed him. This claim she again asserted by her counsel in his opening address to the jury (75) "the plaintiff on her part, will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons *other than the insured.*" There was no issue of accidental shooting; that it

was an intentional shot that caused the death is alleged and conclusively established by the evidence.

Neasham was shot in broad daylight about the time he reached the place where his body was discovered about ten o'clock. The place was two to three miles from the place where he had been seen between 8:15 and 8:45 o'clock that morning. To walk the distance between these two places probably took him until about ten o'clock. He was not, of course, asleep when he arrived there, and even if he, having a comfortable home, had left it to walk from two to three miles along a railroad track to lie down in an oil-pit for the purpose of sleeping, he would not have had time to go to sleep before the attack, if any, would have been made upon him. The would-be murderer would soon have discovered that he was attacking a formidable man—a six-foot, two hundred pound, strapping ranchman (179, 180, 203), armed with a loaded 32-caliber pistol. A murderer does not court his own destruction by being particular where and how he shoots his victim, especially when that intended victim is a powerful man confronting him with a 32-caliber Savage automatic revolver. Would a murderer have risked his life struggling with Neasham in an effort to shove a pistol down his throat? Of course not—incredible—absurd!

Of course Neasham would not have succombed to such an attack without a desperate struggle. Yet his clothing, the ground and his body showed none of the signs which would have inevitably followed such a conflict.

Two disinterested witnesses, the coroner and the undertaker who saw the body before it was disturbed, testified that the clothing was not disarranged. Theirs is the only testimony on the subject. The body was clothed with the usual outer apparel—shirt, collar, necktie, vest, coat and trousers (97, 159), none of which was disarranged, or disturbed—not even the collar or necktie (97, 172).

Neasham's feet were lying almost in the north wheel track of the wagon road running through the bottom of the pit (95, 179. See photograph 317 and explanation 154). Describing the nature of the soil where the body lay as it was within an hour after the body was discovered, the coroner testified that the bottom of the pit was sand and fine gravel, which was soft and damp (94, 95), and the sheriff testified that the soil was of such quality that its top surface would be dry after a freeze and a thaw (151). An examination made the following day of sandy ground from 100 to 125 feet on the other side of the railroad tracks north of the pit showed that there had been a thaw recently, leaving the ground soft (235), so it may be that the ground where the body lay had thawed not long before Neasham got there.

The soil, soft and damp, would have clearly shown a struggle in the pit, had there been any, involving, as it would, a stamping and tearing of the ground. Yet, what did the search of the coroner and the sheriff disclose?

These men were there in the performance of their official duty—the duty to discover what killed Neasham. The coroner examined the ground around

where the body lay to see whether or not there was any evidence of struggle, or other persons being near the body (98) and the sheriff also examined the north bank of the cut to see if any human tracks had come down there, and also the south bank, and a number of feet—possibly fifteen or twenty—around the body (158, 159) the coroner found were the foot-tracks *of one person that led to where the body lay* (99)—these tracks showing distinctly and clearly (100). The sheriff—an officer of years' experience and a close observer of such matters (158)—could find were "three tracks leading down to where the body was lying, *one track leading to the spot,* two other tracks leading to within about eight or ten feet of the spot—those tracks turned and went back" (158). He found nothing on the north bank above the body and nothing on the south bank on the other side of the road about eighteen feet south of the body (95). The only other witness who testified regarding the ground near the body was the undertaker, and he said: "Well, I observed a few tracks going from the east toward the body; I did not take much interest in that. I was interested in other matters." Burke, a witness for plaintiff, testified: "I examined the ground about the place for tracks, and for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there" (233, 234). Evidently Mr. Burke found no indications of other people having been there or any indication of a struggle having taken place there, or he would have testified in regard thereto, and he did not so testify. The testi-

mony of these three witnesses standing undisputed, conclusively establishes the fact that there was one line of foot-tracks, *and only one,* which led to where the body lay. The condition of the soft, moist ground, untrampled, untorn and unmarked except for the footprints referred to—precludes any reasonable inference that someone attacked Neasham there and, shoving a gun into his throat, shot out his life. Neasham, six feet tall, weighed about two hundred pounds (179, 180). Yet the ground showed no signs of a 200-pound body having been dragged over it. The coroner and the sheriff were looking for just such signs but found none.

Two or more persons could have carried the body there, but had two or more persons done so, they would have left foot-tracks, at the spot where the body lay, and the testimony without contradiction, or question, establishes that there was only one line of footprints leading to the body, and none coming away from the body.

The Condition of Neasham's Clothing and the Ground Showing No Signs of His Having Been Pushed or Shoved from the Railroad Tracks Down the Bank to Where He Lay.

The sheriff in particular examined the north bank of the pit which sloped up to the railroad tracks but he found no tracks there, and nothing else noteworthy regarding its appearance (158, 159). Ex-sheriff Burke examined the ground (233). Had the body been shoved down that bank the ground, of course, would have been disturbed and detected by both the sheriff and ex-Sheriff Burke.

Moreover, had an attack been made while Neasham was on the railroad tracks, and the body pushed down the bank, would not his clothing have been disarranged or disturbed and how could the line of tracks at the bottom of the pit leading to the body have gotten there, and no tracks returning from the body?

The Footprints Leading to His Body Made by Neasham Himself.

The testimony is that there was only one line of tracks leading to where the body lay—tracks of only one person; these tracks stopped at the body; they did not return; no testimony that there were any tracks leading from the body; the only reasonable inference that can be drawn from the testimony is that Neasham himself made the tracks that led to the spot where the body lay; Neasham's body was found there because he walked there. One person could not have carried the body there,—it was too heavy; no one dragged the body there, there was no evidence thereof. Further, it is highly improbable that a murderer would drag it there—why should he? The soft, moist, sandy ground and Neasham's clothing showed no signs that his body had been dragged there. The body was not pushed from the railroad tracks down the embankment—neither the ground nor Neasham's clothing showed any signs of it. Sheriff Ferrell, ex-Sheriff Burke and the coroner all testified concerning the oil-pit and its surroundings, but no evidence or indications found suggesting foul play or an attack upon Neasham by anyone.

On the day and after the body was discovered, a number of people visited that vicinity (153). The foot-tracks discovered the next day by witness Burke may have been made by some of them. There is no evidence that they were made on the day Neasham left home and before he shot himself or was shot. The testimony is merely that there were tracks. It does not appear how many tracks or whether there were tracks of more than one person, or whether there were enough tracks, or the tracks were of such a nature as to indicate that an attack might have been made there upon a six-foot, 200-pound powerful man, armed with a 32-caliber Savage automatic pistol, and a gun shoved into his throat and fired. Had Burke, an experienced police officer (220), whom plaintiff's attorney took there to see if there was any evidence of an attack upon Neasham, found anything except just tracks, he would have testified to it when called by plaintiff and asked what he observed there (235).

The presence of tracks 100 to 125 feet north of Neasham's body the day after his body was discovered shows at most that someone had been there at some time. But it is no evidence that anyone was there about ten o'clock the morning of the day when Neasham arrived in that vicinity. When Neasham was seen between 8:15 and 8:45 walking on the railroad tracks easterly toward the pit, he was alone (92). Lalone who discovered the body was, at the time Neasham was shot, walking on the railroad tracks westerly toward the oil-pit which was near him (114). The view along these tracks was unob-

structed (photograph 315). Yet Lalonde saw no one in that vicinity except two men walking on the tracks about 150 yards west of the place where Neasham's body was found, and approaching him. When they came up to him while he was looking down from the railroad at the body, he recognized one of these men, Brown, as an acquaintance. The other man, Rudolph, he did not know (115).

Neasham not on the Railroad Tracks When He was Shot.

Neasham's death was practically instantaneous (310, 311, 198). When Lalonde discovered his body in the pit he was breathing heavily (114, 116, 121, 122). If Neasham was shot on the railroad tracks, it must have been very soon before Lalonde discovered the body. Yet Lalonde, coming along the tracks with a clear view before him, did not see Neasham there or anyone else except Brown and Rudolph approaching about 150 yards distant. And Brown testified he did not see anyone in the vicinity except Rudolph, with whom he was walking, and Lalonde.

No Evidence to Connect Lalonde, Brown or Rudolph With Neasham's Death—Evidence Strongly to the Contrary.

Lalonde, a sheepshearer (116), was walking on the railroad right of way from Sparks where he lived (114, 115), to Reno about ten o'clock Saturday morning. Brown, who was stopping in Reno at the Clarendon Hotel (118), and Rudolph, who, then residing at that hotel (121), had just met him there (123, 118), were taking a walk on the railroad right

of way toward Coney Island and Sparks. Nothing suspicious about that—a very natural thing to do.

Their Conduct Proof of Innocence.

As they looked from the railroad track down at the body below what they saw—a man lying very still (114), a pistol close by his body (115, 116) about three or four inches from his hand (122), breathing heavily (114, 121), blood on his mouth and coat (116)—convinced them that the man had shot himself (119, 121). What were they to do? Here was a large man, shot in the head, all but dead from a pistol shot apparently fired by himself. They could not help him. The obvious and sensible thing to do was to notify at once the authorities who could do what was necessary. And this is what they did. They went at once to a private house and telephoned the police (115, 117, 118, 119, 121, 122). The police! Had they or any of them murdered Neasham, would they have notified the police? Of course not. Having summoned the police, they went back to the place on the railroad track from which they had looked down on the body (119, 115, 121), and found that Neasham had stopped breathing and was apparently dead (115, 122, 123), and they waited there until the sheriff (115, 117, 121) and the undertaker (177) arrived shortly thereafter. Would they have done this had they or any of them murdered Neasham? Certainly not.

Then they went down into the pit with the sheriff and the coroner, who examined the body and surroundings (116). Two of them, at the undertaker's request, went to a near-by house and telephoned for

a wagon in which to remove the body (178). They came back and, with the man they had left, went to Reno with the sheriff (122, 177). Is this the way murderers would have acted? And although they apparently had ample opportunity to disappear, we find them two days later testifying at the coroner's inquest (114–123, 178, 179). Upon such testimony, how could an inference even of suspicion against these men be reasonably drawn? It couldn't be.

Another circumstance makes such an inference even more preposterous. At the coroner's inquest both Lalonde and Rudolph *volunteered* that when they found the body, they could hear Neasham breathing heavily (114, 121). The questions put to them did not require them to disclose this fact. Would murderers have volunteered such information, establishing as it does that they were not far from Neasham at the time he received the wound which caused his instantaneous death? Obviously not.

No Material and Substantial Evidence That Neasham Did not Shoot Himself—The Blood on the Elbow of the Right Coat Sleeve.

Chick, the undertaker, examining the body with the sheriff and undertaker for the first time, testified "the mouth was covered with blood; the wound I could not see. * * * It was inside the mouth," saw blood on Neasham's coat (171, 172) at the elbow of right sleeve (181, 182). Lalonde, testifying at the coroner's inquest two days after he discovered the body and over a year before Chick testified, saw, as he looked over the bank, blood on Neasham's coat

(116). The only blood on the coat was at the elbow of the right sleeve (181, 182). The witnesses who testified as to the position of Neasham's right arm were the sheriff, the coroner, Lalonde and Chick. Of these Lalonde and Chick only observed the blood on the coat, and testified concerning it; the coroner, although asked what he saw in reference to the physical condition of the body (102) and as to what he found on the body (99), did not mention that he saw any blood on the coat, and the sheriff, although asked to state fully what he found (151), said nothing about there being blood on the coat. The only reasonable inference that can be drawn is that Lalonde and Chick observed this fact, while the others did not.

It is undisputed that there was blood on the elbow of the right coat sleeve. It is undisputed that Lalonde and Chick saw blood on the coat before the body was disturbed. It is certain they could not have seen it, had the elbow been underneath Neasham's body, and it conclusively follows that the right arm from the hand to and above the blood spot at the elbow was not covered by Neasham's body. As testified by Chick, it was free and clear of the body (171, 172). There is nothing in Lalonde's testimony to the contrary "one hand was up off the ground like this (indicating)" (116).

How the blood got on the elbow of the coat sleeve is easily explicable. Chick, testifying over a year after he saw the body, did not remember whether Neasham's head or mouth was lying on his right arm (183). No one testified how the head was lying ex-

cept the sheriff who said it was lying up the slope from the bottom of the bank (151). The body was lying on the right side (96, 116, 150, 171).

After the body was found blood was oozing from the mouth and nose (102), and it probably gushed or spurted when the wound was inflicted. Now, these circumstances are entirely consistent with Neasham's having shot himself. After holding the pistol in his mouth with his right hand and firing the shot, his right arm and body would naturally fall back on the slope, and as the body was inclined to the right, it would naturally settle in that direction, bringing his head in contact with the right arm so that the blood gushing or spurting from the nose and mouth would fall on the right elbow. It may be that in the further settling of the body, the head fell away from the arm. Certainly the presence of this blood on Neasham's sleeve does not in the slightest degree tend to show that he was murdered. It is not evidence material and substantial, tending to show that he did not destroy himself. It is a fact entirely in harmony with the inference that he did take his own life.

The Testimony Regarding the Trigger of the Pistol When Found by Neasham's Body.

The pistol was found on the slope of the bank from three to eight inches below Neasham's right hand (96, 116, 122, 152, 156, 172), the muzzle sloping downward with the sand or soft dirt in it (156). The sheriff who picked it up (104, 151) and examined it (108) handed it to the coroner, who looked at it and handed it back to the sheriff (105, 151). The sheriff testified that when he picked up the pistol *the ham-*

mer was back, a loaded cartridge in the chamber (156), that all that would have been necessary to discharge it was to pull the trigger (169), and that the pistol was in practically the same condition when he delivered it to the coroner at the inquest, except that the dirt had dropped from the muzzle, he had removed the loaded shell in the barrel and taken the magazine out of the gun (157). Upon cross-examination, the sheriff was asked if he testified at the coroner's inquest and if he were asked at such inquest certain questions among them being,—

> "Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber, and there is nine in the magazine. * * * Did you so testify? A. No, sir, I did not. I will explain my testimony. * * * Q. Now, did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger? A. I did not." (166–167.)

There is no evidence in the record that he did so testify. True, there was read in evidence, over objection, a part of a paper purporting to be a certified copy of the record of proceedings at the coroner's inquest and this paper reports the sheriff as saying what he emphatically denied he said (251, 252). However, there is no evidence that this paper correctly reports what the sheriff said. No one so testified. The testimony on this subject is that it is *not* a correct report—the testimony of the sheriff, a disinterested witness. The sheriff did not sign it; he never saw it (167) and there is no reason to disbe-

lieve his—the only—testimony on the subject, that it is an incorrect report.

There is no evidence even that it is the transcript of the stenographer who took down the testimony. The stenographer was not a witness at the trial, did not identify it as a copy of the transcript. Had the stenographer, as a witness, identified it as the transcript, the witness might, upon comparing it with the stenographic notes, have found that the part read in evidence was not correctly transcribed. It is probable, in view of the sheriff's denial, that the notes read: "The safety *is* on the trigger," and were incorrectly transcribed as "The safety *was* on the trigger." Or the sheriff in giving his testimony may have said " * * * that the *safety's* on the trigger" and it was written "that the safety was on the trigger." At any rate, that is probably what the sheriff said because, in the first question: "Is this in the same condition as it was?" he said "No"; and then his method of showing the difference in condition was to state the condition of the pistol when produced at the coroner's inquest in the particulars in which it differed from its condition when picked up. And when the question was again asked, "Is it in the same condition?" it is very *improbable* that he would have reversed his mental process by describing the condition of the pistol when picked up in the particulars in which it differed from its condition when produced at the coroner's inquest. Indeed, his method of explanation had not changed when be began his answer, for he said: "It *is* [not "was"] in the same condition with the exception," etc., and then the natural,

simple way of explaining how it *is* not in the same condition would be to state its condition then in the particulars differing from what its condition *was* just as he had done in answer to the first question. Indeed, he is reported as saying: "I took the shell out of the chamber and there is nine in the magazine"—a condition, if he was correctly reported, subsequent to his picking up the pistol and existing at the time of the inquest. Is it not *unlikely* that with respect to the trigger alone, he would have described the condition of the pistol when picked up, and with respect to other conditions be speaking of conditions of the pistol existing at the hearing at the inquest? The sheriff said he did not, and his denial is sustained by common sense.

However, there is no evidence that the sheriff testified at the inquest that the safety was on the trigger when he picked up the pistol. There is positive evidence that the *safety was not on the trigger,* and that he did not so testify—the denial of the sheriff, backed up by the testimony of the sheriff and other witnesses explaining what is meant by and the effect of "the safety on the trigger."

No one is entitled *to speculate and guess* that the author of the transcript, if called as a witness, and confronted by the sheriff and the defendant's attorney, would have testified that the part read from the transcript correctly reported what the sheriff said at the inquest. It is *no evidence at all*—much less evidence material and substantial tending to show Neasham did not commit self-destruction.

The Testimony Regarding the "Shell" in the Chamber of the Pistol When Found by Neasham's Body.

The sheriff testified that when he picked up the pistol the hammer was back and a loaded cartridge (156), loaded shell (169), was in the chamber, and that all that was then necessary to discharge it was to pull the trigger (156, 157, 169), which would have released the hammer, which was at full cock (156). The evidence conclusively shows that when he picked up the pistol there were eight cartridges in it and by it lay an empty shell (101, 105–108, 127, 128, 157).

The portion of the transcript of the proceedings at the coroner's inquest read in evidence at the trial reported the sheriff as having testified that he removed a shell from the chamber, and he testified at the trial that he did remove a shell from the chamber, that it was a loaded shell (169).

The word "shell" is ordinarily used as meaning "cartridge" or "loaded shell." The sheriff testified that he used the word in that sense at the coroner's inquest (169). And the record shows that he was accustomed to say "shell" when meaning "cartridge" or "loaded shell." On his direct examination he said that there was "a loaded cartridge * * * in the chamber; the magazine contained *shells* * * * * " (156, 157). "I had removed the loaded shell in the barrel" (157). These "shells" are in evidence, Defendant's Exhibit No. 1 (128), and they are "eight loaded and one empty" (127). Again, the sheriff testifying as to the character of the wound said: " * * * It was through the mouth, but

toward the back of the head, like concussion, tearing quite a large hole, and carrying everything in front of it, caused by the explosion of the *shell* fired from the gun" (161).

And this is not an unusual use of the word. Collins, who sold the pistol to Neasham, testified: "I did not have enough *shells* to fill it" (112). "I showed him how to throw the first *shell* in the cylinder of the gun" (129), and "The magazine was very tight to put the *shells* in" (143). Hill, the county treasurer, when producing the eight cartridges and the empty shell at the trial, referred to them all as "shells."

> "Q. What, besides the revolver have you—in connection with the revolver?
>
> A. Nothing at all except some of the *shells.*
>
> Mr. KEPNER.—I can't hear you.
>
> A. *Shells.*
>
> Mr. HAWKINS.—(Q.) The magazine and *shells?*
>
> A. Yes.
>
> Q. How many loaded *shells* came into your possession from the coroner?
>
> A. *Eight loaded* and *one empty.*" (127.)

Defendant's attorney referred to the cartridges as "shells" (112); so did the plaintiff's attorney (130), and so did the Court when he, referring to the chamber, asked Collins: "You have to pull the trigger every time, but it does not need any further throw of *shells* in it?" (129.)

We have the repeated statements of the sheriff that there was a loaded shell in the chamber when he

picked up the pistol; and even if he did say at the coroner's inquest that he removed a "shell" from the chamber, such statement is entirely consistent with what he said at the trial, as he was accustomed to use the word "shell" in its ordinary usage as meaning "cartridge" or "loaded shell," and the word was so used at the trial by defendant's attorney, the plaintiff's attorney and the Court himself. There is, therefore, no evidence whatever that there was an *empty* shell in the chamber, and the evidence establishes beyond the shadow of a doubt that there was a loaded shell or cartridge there, and the hammer back.

The Testimony Regarding the Scar, Dent or Depression.

When they examined Neasham's body at the pit upon their arrival there Saturday morning, the sheriff, the coroner and the undertaker—all disinterested in the outcome of this litigation—saw no other evidence of injury to Neasham than the blood coming from his nose and mouth. Not one of them, not even the sheriff—a trained observer charged with the duty of finding evidence of crime, if any—saw a scratch, a cut, a break, a bruise, abrasion, discoloration or anything else on Neasham's body suggestive of a wound or of his having recently been injured, except the blood coming from the nose and mouth (159, 102, 173).

If they saw on Neasham's head what the record shows was there, a mark variously described as a "scar in front and under the hair—a white streak" (174), "about an inch and a half long, starting at

a certain part of the frontal bone and running in under the edge of the hair * * * very slight in depth * * * like a white streak in the flesh where it had healed" (183), "whitish in appearance * * * and perhaps 3/16 inches wide" (185), or "over the right eye running from the forehead, what appeared to be a dent, about an inch or 1¼ inches long in the shape of a crescent" (223), "about ¼ of an inch deep * * * right around the edge of the hair" (224), or "a depression above the right eye, next to the hair in the forehead * * * about 1½ inches long" (239), and "about one-eighth of an inch deep" (240), or "a scar on his forehead * * * about an inch and a half long and extending upward and backward, from about the center of the right side of the forehead * * * extending back into the hair, * * * maybe three-sixteenths of an inch deep" (245), or "on his right forehead, just about the hair-line, * * * a dent, apparently the size of a lead-pencil, or a little larger and possibly two inches to three inches long" (262), "running from the upper forehead toward the ear, along close to the hair-line" (263),—if they saw this, they did not consider it a wound or injury, for when asked, the coroner testified he found no other wounds upon the body than that evidenced by the blood oozing from the mouth and nose (102), and the sheriff testified that he did not find any other injury than that in the mouth (159), and the undertaker testified that he did not see any blood or fresh wound or anything on the body other than blood covering the mouth (173).

The next day, Sunday, the coroner examined the body at the undertaker's parlors and he found no wound on the body except that in the mouth (104). So if he then saw the scar, dent or depression above described, he did not consider it a wound.

On Saturday after the body was removed from the pit to the undertaker's parlors and was undressed, the undertaker saw the mark which he described as a "scar in front, and under the hair * * * a white streak"— not a black and blue place, not a cut, not an abrasion of the skin (174), not a breaking of the skin (186)—about an inch and a half long, very slight in depth, "like a white streak in the flesh where it had healed" (183), "running back into the hair" (184), "whitish in appearance an inch and a half long, and perhaps three-sixteenths of an inch in width" (185), having the appearance of being old (185, 186), as if it had *not* been made recently (186), judging from the experience which he had had with scars (187), having no blue or black spot around its vicinity and showing no breaking of the skin (186) or blood or discoloration (187). It does not appear whether he saw it that day when he first examined the body at the pit, but if he did then see it, he then as well as afterwards did not consider it evidence of a fresh wound (173), but, on the contrary, evidence of an old wound (185, 186).

Burke, an experienced police officer, plaintiff's witness and certainly not prejudiced in favor of defendant, did not, if he saw the mark when the undertaker showed him the body on Sunday at the undertaking parlors, consider it an injury, for he testified he did

not notice any injury of any character except the wound in the mouth (233).

Dr. Gibson, a doctor of medicine for thirty-five years (191), county physician (192), summoned by the coroner to hold a postmortem on the body on Saturday at the undertaker's parlors (193) and then holding such postmortem apparently in the performance of his official duty as county physician to find any injury or wound connected with Neasham's death, found no injury or wound except that in the mouth, for answering the question (192),

> "Please state fully, and in your own way, what that postmortem disclosed; what you found, what you saw and what you did in making this postmortem on the body of Mr. Neasham, *stating specifically and definitely all the wounds that you found, the nature of them, and where they were, and all about it.*"

described the wound in the mouth and the star-shaped fracture at the back of the head forced from the inside but said nothing about the mark (192–195). He very probably saw the mark. He was there for the purpose of making a careful, close examination. The undertaker had the body undressed preparatory for the doctor's postmortem (174); the undertaker had seen the mark when making this preparation (174) and Dr. Gibson must have seen it and examined it. Yet, although asked to state specifically and definitely all the wounds that he found, the nature of them and where they were (192), he did not mention it.

Dr. Gibson, examining the body on Saturday, the day Neasham was killed, with the purpose of finding any and all wounds and injuries on it, did not consider the mark a wound or injury. Neither did the undertaker, who had previously examined the mark that Saturday. Neither did the coroner, who examined the body on Saturday at the undertaker's parlors and must have seen the mark; neither did the sheriff, an experienced police officer (160), who must have seen the mark that day when the body was lying in the pit.

The record discloses no dispute, and conclusively proves, to the exclusion of any other inference, that at the place where the mark appeared there was no cut; no broken skin; no abrasion; no blood.

Only one other witness testified to the appearance of the mark on Saturday, the day Neasham was killed—Thomas H. Curnow, the plaintiff's brother, naturally interested in her winning the case. He testified that "right in the bottom of this dent there was a blue mark, looked like coagulated blood under the skin" (262). Yet the undertaker, an unprejudiced witness, testified that there was no discoloration, not even a slight discoloration at the bottom or lowest part of the mark (186, 187). Ray Cool, Neasham's ward, testifying to the appearance of the mark, that the skin was not broken (226), said that at the time he thought he detected, when he looked at it very closely, some slight lines of blue, very fine (226, 227), "there seemed to be, there was a fine streak of blue in the bottom—very fine, thread-like streak of blue at the bottom of the dent * * *

a fine blue line * * * very light," hard to see, so that if it was discolored at all, it was very slight. Edward Neasham, Neasham's son, testified that when he saw the body the same day Cool did, Monday, he observed the mark, and describing it he made no mention of any blue line or discoloration (245). Myrtle Raymond, Neasham's daughter, testified that when she saw the body at the undertaker's parlors on Sunday evening she noticed the mark, and describing it made no mention of any blue line or discoloration (239).

Dr. Ascher, the family physician for over eleven years (267), testified that when he saw the body at Neasham's home on Monday he did not observe the mark which he termed a "bruise or scar" until his attention was called to it, and he located the bruise or scar on the left side (264); that he then "simply looked at it, and possibly felt of it, but paid no particular attention to it" (268), and did not remember whether there was any discoloration, or at least, if he did see any discoloration, it was so slight as not to attract his particular attention, or to impress him enough so he could remember anything about it.

This is all the testimony there is as to whether there was a "blue mark" at the bottom of the scar, dent or depression. The undertaker said there was none. Edward Neasham, Neasham's son, did not mention any. Myrtle Raymond, Neasham's daughter, did not mention any. Dr. Ascher, the family physician, did not see any. But Ray Cool, Neasham's ward, said he saw "a very fine, thread-like streak of blue * * * a fine blue line * * * very

light," hard to see, and if it was discolored at all, it was very slight. And Thomas Curnow, plaintiff's brother, said "there was a blue mark, looked like coagulated blood under the skin."

Thus, the evidence conclusively shows, to the exclusion of any other reasonable inference, that the scar, dent or depression was whitish and that the utmost which could be fairly or reasonably inferred as to whether there was any discoloration whatever is that there was at the bottom of the scar, dent or depression a blue mark, looking like coagulated blood under the skin, but a very fine, thread-like line or streak of blue, hard to see, very light so that the blue was very slight and escaped the notice of four witnesses who saw the scar, dent or depression—the undertaker, the family physician, Neasham's son and Neasham's daughter.

No witness testified that this place on Neasham's forehead along the edge of his hair was a bruise, wound or injury on the day he observed it. The undertaker described it as a "scar—a white streak—like a white streak in the flesh where it had healed" (183). Ray Cool, Neasham's ward, called it "a dent in the shape of a crescent" (223) and a "depression" (224). Edward Neasham, Neasham's son, styled it a "scar" (245). Thomas Curnow, plaintiff's brother, termed it a "dent" (262) and an "indenture" (263). He also said the indenture was "bruised in," but he did not say *when* it was "bruised in" or that the "indenture" was, when he saw it, a bruise. Dr. Ascher, the family physician, said his attention was called to a "bruise or scar,"

but he did not testify which it was (264), and could not say that it was of recent origin (267). The sheriff did not see any wound or injury other than that in the mouth and the back of the head (159); neither did the coroner (102); neither did the undertaker (173); neither did Dr. Gibson, who performed the postmortem (192).

Let us see, then, what evidence, if any, there is that this scar, dent or depression was a wound, bruise or injury inflicted on Neasham the day he died. For if there is no material, substantial evidence tending to show it was, then unquestionably there was no evidence for the jury to weigh as to whether or not someone that Saturday morning attacked Neasham and struck that scar, dent or depression into his forehead.

First, could this *possibly* have happened and leave no cut, no broken skin, no abrasion, no blood, nothing but a whitish scar, dent or depression one-eighth to one-quarter inches deep and about one and a quarter inches long and a fine, thread-like line or streak of faint blue—hard to see—at the bottom? Obviously to produce a depression of such depth would require a blow of considerable force. So testified the plaintiff's expert witness, her family physician, Dr. Ascher (266, 267), and he also stated that the depression appeared to have been produced by a more or less blunt instrument (267) and might have been produced in innumerable ways (267), and witness Cool suggested a pipe (225). Neither, however, stated *when* he thought the blow had been struck.

And yet there was no cut, no break of the skin,

no abrasion, no blood! No wonder plaintiff's expert witness and family doctor, coming as such "in close contact with Mr. Neasham over a period of eleven years" (267) and who, when the mark was pointed out to him before Neasham's funeral, did not regard it of sufficient consequence to "take any particular notice of it" (266), although he would naturally be particularly interested in any evidence of foul play—no wonder Dr. Ascher could not testify that the scar, dent or depression was of recent origin. He said it was *impossible* for him to do so (267). He, an experienced physician, having close professional relations with Neasham for over eleven years, said it was *impossible* to testify that this mark was of recent origin. No witness said it was. How, then, could there be any evidence for the jury as to whether or not it was of recent origin? There wasn't any. Common sense, as well as expert testimony, forbade there should be any.

Dr. Ascher found it impossible to conclude that the mark was of recent origin, he was able to *speculate* about the absence of discoloration—theorize as to whether when death immediately or shortly afterwards follows a blow sufficient to produce such a mark, there would not be discoloration. He said "there would be less tendency to have any discoloration, or possibly any at all" (270), because with death the blood stops circulating (270). He did not say there would not be discoloration, but merely that such tendency would be *possibly* less.

This *possibility,* so far as based upon immediate death stopping circulation of the blood, can have no

bearing on this case because, although Neasham's death was practically instantaneous, still his heart did not cease beating until about a half hour after his body was discovered; the undertaker testified that when he, with the coroner and the sheriff, examined the body at the pit, Neasham's heart was slightly pulsating (176) and the circulation of his blood had not stopped, for the coroner testified that the blood was oozing from his mouth and nose (102).

The balance of the assumption upon which the possibility was based is that death followed shortly after the blow. The doctor's hypothesis was: "If death had taken place immediately, or a short time afterward." How short a time he had in mind does not appear. The reason he gave for the possibility was the ceasing of the circulation of blood, so he must have had in mind a time so short as almost immediately to follow the blow. But he did not testify that had the blood continued to circulate for about a half hour after the blow was struck—and the blood did circulate for about a half hour after Neasham was shot—the tendency to discoloration would be possibly less. His statements as to what might be possible, based upon an hypothesis which no one can say has the support of any evidence in the record, is, therefore, no evidence at all.

The speculative nature of the doctor's testimony is even more manifest as we consider it further. He testified that if the mark was caused by a blow, it was possibly of sufficient force to break the capillaries and cause the blood to come out (271). So the most that the doctor said was that the tendency of a blow

sufficient to produce the mark to cause discoloration would be *possibly* less if death ensued immediately or shortly afterwards, and that such a blow was *possibly* of sufficient force to produce discoloration. To be sure, he said that a blow of sufficient force to knock Neasham down would not necessarily have caused discoloration (272). But he did not say, and it does not appear in the record, that a blow of sufficient force to produce the mark did not exceed the force necessary to knock Neasham down. He said that the capillaries at the place where the mark was are more difficult to break by a blow than are capillaries in other parts of the body because of the nature of the tissue, *and because of the hair protecting the place as the hair could have been very easily down,* although he did not know whether it was or not (273), and there is nothing in the record tending to show that it was.

The doctor correctly appraised his own testimony; he knew, what is perfectly obvious, that he was guessing, speculating, and so he said it was impossible for him to deduce that the mark was of recent origin (267). So it is for anyone else. Based upon an hypothesis unsupported by any evidence, and because purely speculative, his testimony was no evidence that someone struck Neasham on the head and then shoving a pistol into his mouth shot him.

One, and only one, opinion of the doctor was based upon any evidence. The evidence is very strong—practically conclusive—that the mark was a scar. Asked what is the shortest time within which a scar from a wound may be formed, the doctor said sev-

eral weeks probably, and then said it may form in probably a week (273); that "an ordinary scar at first is red in color, and gradually fades out, takes on more or less the appearance of the surrounding skin"; that the whiteness would come gradually and may cover a period of several years (274). This demonstrates that if the mark was a "scar," it could not possibly have been the result of a blow received by Neasham the day he died.

It should also be noticed that the doctor, called by the plaintiff, did not explain how a blow sufficient to produce the mark could have been struck and leave no cut, no broken skin, no abrasion, no blood. There is nothing in the record to explain this, for the obvious reason that it would be impossible.

The Court will notice that—

1. The mark (a) showed no cut; (b) showed no broken skin; (c) showed no abrasion; (d) showed no blood; (e) if a scar, could not have been struck into Neasham's head on the day he died.

2. The coroner found no other *wound* than that in the mouth.

3. The sheriff found no other *injury* than that in the mouth.

4. The undertaker found no *fresh wound* other than that in the mouth.

5. Burke, the experienced officer, witness for plaintiff, did not notice any *injury* of any character except the wound in the mouth.

6. The county physician who performed the autopsy found no *injury or wound* except that in the mouth, and back of head.

7. The family physician—Neacham's physician for over eleven years—when his attention was called to the mark *paid no particular attention to it.*

8. No witness testified that the mark was, on the day he saw it, or on the day Neasham died, a bruise, wound or injury.

9. There is no evidence that if the mark was struck into Neasham's head just before he was shot, and he died and his blood ceased to circulate about a half hour after he was shot, (a) the mark could possibly be whitish as it was; (b) the mark could show no cut, no broken skin, no abrasion, no blood, as was the case here.

10. There is no evidence that Neasham was attacked and struck, and the evidence shows conclusively, to the exclusion of any other reasonable inference, that he was not attacked, but that he committed self-destruction.

To be added is the fact that the skin where the mark was—showing no cut, no break, no abrasion, no blood—adhered tightly to the bone. So testified Neasham's ward, Ray Cool, and he said when he worked this skin with his finger, it was not loose, did not slip around, and was firm and solid "like it was stuck to something" (227, 228). These are not the characteristics of skin which had just been struck by a blow of sufficient force to produce a mark of such depth. They are the characteristics of skin injured long before.

The above evidence conclusively establishes that the mark could not possibly have been produced by a blow struck Neasham on the day he died.

It is true plaintiff's daughter (239, 240), her son (245), the plaintiff's brother (247), Neasham's ward (224), and the family physician (267) each testified to never having seen the mark before Neasham's death. But the plaintiff herself—*and this is significant*—Neasham's wife living with him for over twenty-four years (84), *did not testify that she had not seen the mark before* her husband died. If she had not seen it, would not her attorney, who questioned so many others on the subject, have questioned her so as to elicit such fact? Of course, he would.

Now, the mark was at the edge of the hair line (174, 183, 224, 239, 273), so that the hair might have covered the mark (273). This may have been the reason why the daughter, son, ward and family physician had not seen it.

At any rate, this testimony has no material and substantial bearing on the clear and undisputed evidence above outlined that the blow producing the mark could not possibly have been struck on Saturday. It does not explain the whitish appearance of the mark, the absence of any cut, broken skin, abrasion or blood; and the overwhelming evidence that no one attacked Neasham.

No reasonable man from such testimony could even hazard a *guess* that Neasham was murdered. It is no evidence that Neasham did not commit self-destruction.

The Testimony Regarding Motive.

There is no evidence that anyone had a motive for murdering Neasham—none that he ever had an

enemy or had done anything which might excite enmity. The evidence establishes that Neasham was not robbed—hence no one evinced a motive to rob him. Neasham was satisfied that his purpose in buying the pistol about sixteen hours before his death was met by loading it with nine cartridges, and he was absent from his home the night immediately preceding his death. All the evidence excludes the inference that he was murdered, or that he accidentally shot himself. Reasoning by process of exclusion, it follows that he committed self-destruction.

It is not material that the record does not disclose what his motive was; it does appear (332) that his estate was insolvent and his financial affairs in a bad condition; and in the cross-examination of Mrs. Raymond, a daughter of plaintiff and deceased, that she testified at the coroner's inquest; she was then asked (242–243) if she were not asked the following questions and returned the following answers:

> "'Q. Did you know of any trouble that might have been troubling Mr. Neasham? A. Nothing definite; there are things that we think we can see, but nothing definite that we could seem to know that could put him into such a state. Q. Those were business worries? A. Yes.' Were you asked those questions, and did you return those answers?
>
> A. I don't remember a thing about it; at the present time I don't remember either the questions or the answers.
>
> Q. You don't remember? A. I don't remember."

And the record does establish beyond the shadow of a doubt that he destroyed himself, and, as a corollary, that he did so either because his mind was deranged or because *for some reason of his own he was tired of life.*

At the conclusion of all the evidence offered by both plaintiff and defendant, defendant moved that the jury be instructed to return a verdict for the defendant for reasons therein stated (Tr. 284–286).

The motion was denied; exceptions taken and allowed for reasons stated (Tr. 286–288).

Defendant requested the Court to give to the jury instructions No. 1 and No. 2 (Tr. 288).

The case was argued and the jury charged (Tr. 289–300). The instructions requested by defendant, Nos. 1 and 2, were refused. Defendant excepted to portions of the charge of the Court to the jury (Tr. 300).

Thereupon the jury, at 3:20 o'clock P. M., retired to consider their verdict, and at 5:10 o'clock P. M. returned into court with request "to have read the transcript of Sheriff Ferrel's evidence before the *coroner's* jury. * * * And we want to hear read ex-Sheriff Burke's testimony before this jury."

> "JUROR.—We would like to have ex-Sheriff Burke's evidence read as to the tracks he testified to having found on the *railroad.*" (Tr. 301.)

Thereupon testimony was read to the jury (Tr. 302, 303). The Court will observe that the testimony thus read to the jury as the testimony of ex-Sheriff Burke *is erroneous and misleading,* in that it

represented and stated to the jury that ex-Sheriff Burke testified that he observed tracks and a place where someone had been lying down in the gravel or oil-pit where the body of Neasham was found, when in truth the ex-Sheriff testified that the place where he observed the tracks and the place where someone had been lying down was at a point from 100 to 125 feet distant and across the railroad tracks from the gravel-pit in which the body of Neasham was found, as clearly appears from the record. (Tr. 233–235 and Plaintiff's Exhibits "D" and "E," Tr. 314, 315); while the testimony thus read to the jury was that ex-Sheriff Burke had found the conditions there testified to by him as existing in the gravel or oil-pit, shown in Plaintiff's Exhibit "D," and being the pit in which the body of Neasham was found.

After the jury had heard read such testimony it retired, and at 6:10 o'clock P. M. returned into court with a verdict for plaintiff in the sum of $10,689.30. Judgment was entered but on motion for defendant execution thereon was stayed forty-two days, and defendant was allowed forty-two days within which to take such further steps herein as advised (Tr. 43), and thereafter stay bond was approved and filed and further orders made and entered concerning filing of petition or motion for new trial and bill of exceptions and reserving jurisdiction of the case; notice of and petition or motion for new trial filed within the time allowed; motion for new trial heard and denied; assignment of errors served and filed and petition for writ of error allowed, served and

filed (Tr. 43–72); and "Stipulation and Statement," etc. (Tr. 328–335).

The Questions Involved and the Manner in Which They are Raised.

1. Error of the Court in overruling demurrer to the complaint (Tr. 9; Assignment of Error I, Tr. 52).

2. Error of the Court in overruling motion for defendant at close of plaintiff's evidence for nonsuit and to direct a verdict upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of $10,000 (Tr. 84–87; Assignment of Error II, Tr. 52).

3. Error of the court in ruling and holding, under the pleadings and opening statement of plaintiff's attorney and plaintiff's proof in chief, that plaintiff had made a *prima facie* case; that the burden of proof was upon defendant to establish self-destruction of the insured (Tr. 87, 291; Assignment of Error III, Tr. 55–56).

4. Error of the Court in sustaining objections to questions propounded to Dr. Gibson, witness for defendant (Tr. 199, 200; Assignment of Error IV, Tr. 56–57).

5. Error of the Court in sustaining objections to questions propounded to Dr. Morrison, witness for defendant (Tr. 209, 210, 211; Assignment of Error V, Tr. 57).

6. Error of the Court in admitting, over objection of defendant, testimony of witness Burke as to what he saw on the ground February 28th, the day after the insured was discovered dead in the gravel-

pit (Tr. 235, 303; Assignment of Error VI, Tr. 58).

7. Error of the Court in permitting plaintiff, over objections of defendant, to offer in evidence that which purported to be portion of the testimony of witness Sheriff Ferrel before the coroner (Tr. 251, 252, 302; Assignment of Error VII, Tr. 58, 59).

8. Error of the Court in refusing to grant and in overruling and denying defendant's motion, at the conclusion of all the evidence, to direct a verdict and to instruct the jury to return a verdict for defendant (Tr. 284–286; Assignment of Error VIII, Tr. 59–61).

9. Error of the Court in refusing to give to the jury defendant's requested instruction No. 1 (Tr. 288; Assignment of Error IX, Tr. 61).

10. Error of the Court in refusing to give to the jury defendant's requested instruction No. 2 (Tr. 288; Assignment of Error X, Tr. 61–62).

11. Error of the Court in all, each and every part of its charge to the jury wherein and whereby the jury was authorized to determine any question of fact or theory concerning the death of the insured except that the insured came to his death from a gunshot wound *self-inflicted or inflicted by some person or persons other than himself,* and wherein and whereby the jury was instructed,—(a) that plaintiff had made a *prima facie* case; that the defense of self-destruction means the same thing as suicide; and is an affirmative defense, and the burden is upon the defendant to establish by a preponderance of the evidence, with reasonable certainty, that the death was the result of self-destruction, "rather than *accident,*

mischance" (Tr. 291); (b) that the term "self-destruction," used in the policy and understood in the law "does not necessarily cover and include every instance in which a man dies as a result of his own act" (Tr. 291–292); (c) "if, on the other hand, the jury find that the shooting was done by the deceased, but that it was done *accidentally,* or was the result of *carelessness,* and without the intent or purpose of taking his life, then, under the evidence, the *plaintiff will be entitled to a verdict"* (Tr. 293); (d) "All I intend by this suggestion to you is, that if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with *some other theory* which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment" (Tr. 298); (e) "that the evidence must enable them to find that the death was the result of self-destruction, or of course the plaintiff would be entitled to recover. The burden, gentlemen of the jury, being upon the defendant to establish its affirmative defense that this death was the result of self-destruction, it follows * * * that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then of course the defendant will not have sustained the burden of proof by a preponderance of the evidence, and *your verdict will necessarily be for the plaintiff.*" (Tr. 299–300; Assignment of Error XI, Tr. 62–66.)

12. The verdict of the jury is not sustained by the evidence (Tr. 72, 322; Assignment of Error XII, 66–68).

13. There was no testimony tending to sustain the verdict of the jury (Tr. 72, 322; Assignment of Error XIII, Tr. 68).

14. The verdict of the jury was contrary to the law (Assignment of Error XIV, Tr. 68).

15. Errors occurring during the trial, to which exceptions were taken, as appears from the record (72, 322).

16. Error of the Court in denying defendant's motion for new trial (Tr. 45–50, 18–42).

Specifications of Error Relied upon and Intended to be Urged.

Defendant specifies the following, as errors relied upon and intended to be urged for the reversal of the judgment herein, to wit:

1. Error of the Court in overruling the demurrer to the complaint and denying the motion to make the complaint more specific and certain. said demurrer being that the complaint is ambiguous and uncertain, in that it does not appear from said complaint whether insured was or was not guilty of self-destruction; that the complaint does not state facts sufficient to constitute a cause of action, and the motion being upon the grounds that the cause of action is founded upon a written contract containing the "self-destruction" clause, and it appearing that deceased died during the first insurance year, it is not alleged in the complaint whether or not the death of the insured cast plaintiff's cause of action upon

facts entitling plaintiff to recover the $10,000, or a sum equal to the premiums under the contract which have been paid to and received by the company, and no more (Tr. 6–9; Assignment of Error I, Tr. 52).

2. Error of the Court in overruling the motion by defendant at close of plaintiff's evidence for nonsuit and to direct a verdict for defendant upon the cause of action asserted by the plaintiff wherein she sought to recover $10,000, the amount of insurance under said contract (Tr. 84–87).

3. Error of the Court in ruling and holding under the pleadings and the opening statement of plaintiff's attorney and plaintiff's proof in chief that plaintiff had made a *prima facie* case; that the burden of proof was upon defendant to establish self-destruction of the insured (Tr. 87, 291), for the following reasons:

This action is based upon a contract, Exhibit "A" to the complaint, in which, *inter alia,* the following appears:

> "SELF–DESTRUCTION. In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more."

The action thus being upon said contract, conditioned under certain circumstances creating a liability in a given sum and under other circumstances creating a liability in a different sum, both sums being definitely specified in the contract upon which the cause of action was based; plaintiff, as a condi-

tion precedent to recovery, is required to allege facts, which, if true, would entitle her to recover the amount sought; death occurring within the first insurance year, as shown by the complaint, it was essential to and a condition precedent to plaintiff's right to recover the full amount of the policy that she allege and prove facts authorizing a judgment for the sum of $10,000, that being one of the sums specified as to become due and payable upon the happening of certain events; no such allegations appear in the complaint, and no proof of such facts was made by plaintiff (Tr. 72–87; Assignment of Error III, Tr. 55, 56).

4. Error of the Court in sustaining objections of plaintiff to questions propounded to Dr. Gibson, and in refusing to permit defendant to state its offer to prove, as appears Tr. 199, 200, 202, said questions, to which objection of plaintiff was sustained, being as follows:

> "Q. Can you state the difference between gunshot wound, or a pistol shot wound, made by the pistol being fired close to the object that it strikes, and when it is some distance from the object?"
>
> "Q. If a pistol shot was fired with the pistol close to the anatomy of a human person, right up close to it, would there be any difference between the character of the wound thus made and the character of a wound received by a bullet from the same pistol fired at some distance from that object?"

"Q. Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by someone else?

"Q. What is your opinion as to whether the wound was inflicted by William C. Neasham himself or by another?" (Tr. 199, 200, 202; Assignment of Error IV, Tr. 56, 57.)

5. Error of the Court in sustaining objections of plaintiff to questions propounded to Dr. Morrison, as appears Tr. 209, 210, 211:

"Q. Assuming that testimony to be true, state whether or not in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?" * * * (Tr. 209.)

"Q. Assuming the testimony of Doctor Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth, and lips were not injured, would it in your opinion be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased." * * * (Tr. 210.)

"Q. Assuming the testimony of Doctor Gibson as true—I will ask this question, your Honor, to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?" (Tr. 211; Assignment of Error V, Tr. 57.)

6. Error of the Court, in admitting, over objection of defendant, the testimony of Witness Burke as to what he saw on the ground February 28, 1915, the day after the insured was discovered dead, at a point from 100 to 125 feet distant and across the railroad tracks from the place where the body of Neasham was discovered in the gravel or oil pit, the record in reference thereto (Tr. 233–235) being as follows:

"Q. Tell the Court what you observed.

The COURT.—When was it; find out when it was.

Q. When did you see it?

A. I saw it on the 28th of February.

The COURT.—You didn't see it the day that his body was brought in?

A. No, sir, not that day, I didn't see it until the next day—the next day after it was brought in. Assuming that it was brought in on the 27th, I saw the body on Sunday, the 28th."

* * *

"Q. What examination did you make, Mr. Burke, of the so-called gravel-pit, shown in Plaintiff's Exhibit 'D'?

A. I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there.

Mr. HAWKINS.—(Q.) That was on the 28th? A. On the 28th.

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial, being a whole day after the occurrence happened there.

The COURT.—That only goes to its weight, not to its admissibility. You may argue to the jury all these things that suggest themselves to your mind as weakening the testimony, but that only goes to its effect, not to its admissibility.

Mr. HAWKINS.—I would like to object to it as incompetent, irrelevant and immaterial at the present time, and it not being shown that the condition on the 28th was the same as the condition on February 27th.

The COURT.—Objection overruled.

Mr. HAWKINS.—Exception for the reasons stated.

Mr. KEPNER.—(Q.) Calling your attention to Plaintiff's Exhibit 'E,' and to the portion of the exhibit where the two men appear to be standing, I will ask you where that point is with reference to the oil-pit or gravel-pit, where the body was found?

A. The point where the two men were standing here is north of the oil-pit, and across the railroad track from that.

Q. How far is it, approximately, between those two points?

A. I should say it is a hundred and twenty-five feet.

Mr. HAWKINS.—(Q.) How far?

A. About a hundred to a hundred and twenty-five feet.

Mr. KEPNER.—(Q.) Did you make any examination of that place on the 28th of February?

A. Yes, sir.

Q. What did you observe?

Mr. HAWKINS.—I object to the question on the ground it is incompetent, irrelevant and immaterial, and it not being shown it was the same place and the same condition that existed on the day of the event being inquired about.

The COURT.—He don't have to show that under circumstances such as these. The objection will be overruled.

Mr. HAWKINS.—We ask the benefit of an exception.

The COURT.—Answer the question: What did you observe at that place—you mean where the men are standing, don't you, or are shown to be standing in that photograph?

Mr. KEPNER.—Yes.

A. I observed tracks in the ground there; the ground was soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down."

Also error of the Court in permitting to be read, and in erroneous reading of testimony of Witness Burke to the jury as shown at Tr. 301, 303, thereby impressing upon the mind of the jury the testimony of said Burke to the effect, as shown by the Tr. 303, that the examination and the facts testified as hav-

ing been found by said Burke were of and concerning the gravel-pit wherein the body of deceased lay when discovered dead or dying, when the testimony of said Burke was given in reference to the ground examined and conditions thereof across the railroad track and 100 to 125 feet distant from the pit in which the body of deceased was found, said record at p. 303 in reference to the testimony of said Burke so read to the jury being:

A. A. BURKE.

"Q. What examination did you make, Mr. Burke, of the so-called gravel-pit, shown in Plaintiff's Exhibit 'D'?

A. I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there.

Q. Did you make any examination of that place on the 28th of February? A. Yes, sir.

Q. What did you observe?

A. I observed tracks in the ground there; the ground was a soft, sandy ground, and had lately thawed out from being frozen; the ground was soft, and I observed tracks there, and observed a place where some one had been lying down." (Assignment of Error VI, Tr. 58.)

7. Error of the Court in permitting plaintiff, over defendant's objection, to offer in evidence what purported to be a portion of the testimony of Witness Ferrel before the coroner, concerning the gun picked

up by the side of the body of deceased and the condition thereof (Tr. 251–252), said portion of said record so offered and read into the record, over objection of defendant, being:

> "Mr. KEPNER.—I read the portion of the testimony of Charles P. Ferrell appearing on page 7 of the transcript, beginning with line 15. (Reads:) 'Q. By Mr. Lunsford: Did you take the gun? A. Yes, sir, I picked the gun up. Q. It is here now? A. Yes, sir. This is the gun. Q. Is this in the same condition as it was? A. No; I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger. I took the shell out of the chamber, and there is nine in the magazine. Q. You have the empty cartridge now? A. Yes.'" (Tr. 252.)

Also error of the Court in permitting to be read the testimony of witness Ferrel to the jury, as shown at Tr. 301, 302, thereby impressing upon the mind of the jury the testimony of said Ferrel, said record at p. 302 in reference to the testimony of said Ferrel, so read to the jury, being:

C. P. FERRELL.

> "Mr. KEPNER.—(Q.) Did you testify at the coroner's inquest in Reno on the occasion when you say you delivered this gun to Mr. Unsworth? A. I did.
>
> Q. And you were asked about this gun at that time? A. I was.

Q. I will get you to state whether you were asked this question by the district attorney: 'Q. Did you take the gun?' to which you answered, 'Yes, I picked the gun up.' A. I did.

Q. Then you produced the gun; and then you were asked this question, referring to this same pistol; 'Is this in the same condition as it was?' to which you answered, 'No, I removed the shell from the chamber, and there are nine shells in the magazine.'

A. Well, you are getting two questions together.

Q. The question and your answer. The question: 'Is this in the same condition as it was?' to which you answered: 'No, I removed the shell from the chamber, and there are nine shells in the magazine.' Did you so testify?

A. It is compounded in two questions.

Q. Now, the question was repeated: 'Q. Is it in the same condition?

A. It is in the same condition with the exception that the safety was on the trigger, I took the shell out of the chamber and there is nine in the magazine.' Did you so testify?

A. No, sir, I did not. I will explain my testimony.

Q. Now, did you testify in substance, Mr. Sheriff, that when you picked this pistol up the safety was on the trigger?

A. I did not.'' (Tr. 302, 303; Assignment of Error VII, Tr. 58, 59.)

8. Error of the Court in refusing to grant and in overruling and denying defendant's motion made at the conclusion of all the evidence offered by both parties to the case to direct a verdict and to instruct the jury to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint in so far as plaintiff seeks to recover the sum of $10,000 as the amount of insurance under said contract, Exhibit "A" to the complaint, for the following reasons:

"1. That under the pleadings and evidence in this cause, and the law applicable thereto, there is no liability as against the defendant for, and the defendant is not indebted to the plaintiff in said sum of, $10,000.

2. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit 'A,' attached to and made a part of the complaint.

3. That it appears from the record in the cause:

a. That 'In event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more.'

b. That the first insurance year under said contract, Exhibit 'A' to the complaint, was between the 10th day of July, 1914, and the 10th day of July, 1915.

c. That said insured, William C. Neasham, during said first insurance year, and on, to wit,

February 27, 1915, committed self-destruction by a gunshot wound self-inflicted.

4. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not $10,000, and, under the terms of said contract, Exhibit 'A' to the complaint, the plaintiff is not entitled to recover said sum of $10,000, or any other sum or amount greater than a sum equal to the premiums, on said contract or policy, Exhibit 'A' to the complaint, which have been paid to and received by the company; and it appears from the record herein, and is admitted that the premium on said contract or policy, Exhibit 'A' to the complaint, was the sum of $456.90, and no more." (Tr. 284–286; Assignment of Error VIII, Tr. 59–61.)

9. Error of the Court in refusing to charge the jury as requested by defendant's requested instruction No. 1 (Tr. 288), which reads as follows:

"The jury are instructed that under the evidence in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, upon the cause of action asserted in plaintiff's complaint, in so far as plaintiff seeks to recover the sum of Ten Thousand Dollars as the amount of the insurance under said contract, Exhibit 'A' to the complaint herein. You are therefore instructed to return a verdict for the defendant upon the cause of action asserted in plaintiff's complaint,

in so far as plaintiff seeks to recover a judgment of Ten Thousand Dollars as to the amount of the insurance under said contract, Exhibit 'A' to the complaint herein." (Assignment of Error IX, Tr. 61.)

10. Error of the Court in refusing to charge the jury as requested by defendant's requested instruction No. 2 (Tr. 288), which reads as follows:

"The jury are instructed that under the facts in this case and the law applicable thereto, there is no liability against the defendant, New York Life Insurance Company, and you are instructed to return a verdict for the defendant." (Assignment of Error X, Tr. 61, 62.)

11. Error of the Court under the pleadings and the issues joined thereby (Tr. 1–5, 9–13, 14–16), and the opening statement of plaintiff's attorney (Tr. 75), in all, each, and every part of its charge to the jury, wherein and whereby the jury was instructed,—that plaintiff has made a *prima facie* case; that the burden is on the defendant to establish, by a preponderance of the evidence, self-destruction; that "self-destruction," used in the contract, means the same thing as suicide; the proof must establish, with reasonable certainty, "that the death was the result of self-destruction, rather than accident, mischance"; that if decedent was accidentally killed, although death results from his own act, "it is not self-destruction or suicide so as to excuse a defendant's liability"; "If, on the other hand, the jury find that the shooting was done by the deceased, but that it was done accidentally, or was the result of care-

lessness, and without the intent or purpose of taking his life, then under the evidence, the plaintiff will be entitled to a verdict," and wherein and whereby the jury was instructed and authorized to determine any question of fact or theory concerning the death of the insured, except that insured came to his death from a gunshot wound self-inflicted or inflicted by some person or persons other than himself.

That part of the charge to which this error is specified appears in the record, Tr. 291, 292, 293, 298, 299, 300, and is as follows:

> "The evidence shows without conflict, and in fact it is admitted, that the death of the insured occurred during the first year of the existence of the policy; and the main issue, therefore, which I have referred to is as to the manner of that death, since, under the evidence in the case, *the plaintiff has made out her cause of action entitling her to recover* the stipulated amount of insurance, unless that right is found by you to have been defeated by the act of the deceased in taking his own life.
>
> If the insured died from any other cause than self-destruction, plaintiff must recover. If he took his own life, whether sane or insane, the verdict must be for the defendant.
>
> The defense of *self-destruction or suicide,* which for present purposes *means the same thing,* is an affirmative defense, and the *burden of proving it rests upon the defendant* who asserts it. Suicide or self-destruction, being at variance with the ordinary human instincts, and

involving a wrongful act, is never to be presumed, but must be proved or established by evidence sufficiently satisfactory to overcome the presumption against it, and to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of the death of the person involved other than that of self-destruction. The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to overcome the presumption of the innocence of the deceased of the wrong involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, *rather than accident, mischance,* or violent injury inflicted at the hands of another.

The term 'self-destruction' used in this policy and understood in the law, does not necessarily cover and include every instance in which a man dies as a result of his own act. The term means, and is intended to mean, and is meant to express the instance where the act which produces death is done intentionally, and with the deliberate purpose of producing death. In other words, self-destruction contemplates a union or joint operation of act and intent. It is the intent with which the act is done which distinguishes it from death *resulting from accident or negligence.* If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result is *accidentally*

killed, in such an instance, although death results from his own act, *it is not self-destruction* or suicide *such as to excuse a defendant's liability,* for the intent is absent. In such case it is what is denominated an *accidental death.* Whereas, if the same act be done intentionally, with the purpose of taking his life, it is self-destruction in the sense in which that term is used in the policy. While the person whose act is concerned must be conscious of the fact that the act he does is dangerous and may produce death, it is not necessary under such a provision as that involved here, in order to relieve the insurer, that the person taking his life be conscious of the moral quality or consequence of his act, but only that he know that the means he employs will cause, or is calculated to cause, death or danger to his life.

The fact of self-destruction, like any other fact in a civil case not requiring some specific mode of proof, may be shown by circumstantial evidence, but the circumstances as the basis of such fact should, like any other character of evidence, be *such as to exclude* with reasonable certainty, *as I have indicated, any other theory or cause* to account for the death of the person involved.

Applying these principles to the evidence in this case, if the jury find that the act of shooting was done by the deceased, that it was done intentionally, and with the purpose of taking his own life, then, as I have said, whether he was at

the time sane or insane, the plaintiff cannot recover. If, on the other hand, the jury find that the *shooting was done by the deceased,* but that it was done *accidentally,* or was the *result of carelessness,* and without the intent or purpose of taking his life, *then under the evidence, the plaintiff will be entitled to a verdict.*" * * * (Tr. 290–293.)

"You are permitted, if you see fit, to base your verdict upon a theory wholly separate and apart from that advanced by either counsel, under any circumstances appearing in the evidence which will warrant such a theory. Any theory which underlies the verdict of a jury must be supported by evidence in the case. All I intend by this suggestion to you is, that if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with some other theory which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment." * * * (Tr. 298.)

"The COURT.—Well, that is covered by the charge of the Court when it instructs the jury that the evidence must enable them to find that the death was the result of self-destruction, *or of course the plaintiff would be entitled to recover.*

The burden, gentlemen of the jury, being

upon the defendant to establish its affirmative defense that this death was the result of self-destruction, it follows, as I have heretofore suggested to you—perhaps counsel didn't notice it—that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, if it leaves you in doubt, then of course the defendant will not have sustained the burden of proof by a preponderance of the evidence, and *your verdict will necessarily be for the plaintiff.*" (Tr. 299, 300; Assignment of Error XI, Tr. 62–66.)

It being admitted by the pleadings that the insured came to his death from a gunshot wound—the defendant alleging that the insured came to his death as the result of a self-inflicted gunshot wound, while plaintiff in her reply alleges that the insured "came to his death * * * from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff," and in plaintiff's opening statement asserts "the plaintiff on her part will contend as to that point that the insured came to his death at the hands of some person or persons unknown—some person or persons *other than the insured.*"

There was no issue of accident or mischance under the pleadings or under the contentions of the parties concerning which the jury could speculate or theorize, and accident, mischance, carelessness and all like words and phrases complained of were injected into the case for the first time by the Court's charge to the jury, thereby authorizing, permitting

and instructing the jury to find for the plaintiff upon a theory of the case which was not in issue as made.

12. There is no material and substantial evidence which, if credited by the jury, would in law justify the verdict of the jury in favor of the plaintiff (Tr. 72–322):

> "1. The verdict of the jury, upon all the evidence, in so far as plaintiff sought to recover the sum of $10,000 should have been in favor of defendant, for the following reasons:
>
> A. That under the pleadings and evidence in this case, and the law applicable thereto, there is no liability against the defendant company, and the defendant is not indebted to the plaintiff in the said sum of Ten Thousand Dollars.
>
> B. That the cause of action asserted in plaintiff's complaint is founded and based upon a written contract, Exhibit 'A' attached to and made a part of the complaint.
>
> C. That it appears from the record in this cause:
>
> a. That 'in event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more.'
>
> b. That the first insurance year under said contract, Exhibit 'A' to the complaint was between the 10th day of July, 1914, and the 10th day of July, 1915.
>
> c. That said insured, William C. Neasham, during said first insurance year, and on, to wit,

February 27th, 1915, committed self-destruction by a gunshot wound self-inflicted.

D. That by reason of the fact that said insured, William C. Neasham, did destroy or kill himself during the first insurance year, the amount of the insurance was not Ten Thousand Dollars, and under the terms of said contract, Exhibit 'A' to the complaint, the plaintiff is not entitled to recover said sum of Ten Thousand Dollars, or any other sum or amount greater than a sum equal to the premium on said contract or policy, Exhibit 'A' to the complaint which has been paid to and received by the company. And it appears from the record herein, and is admitted, that the premium on said contract or policy, Exhibit 'A' to the complaint, was the sum of $456.90, and no more.

2. That the verdict of the jury, if for the plaintiff, under the evidence should have been only for the sum of $456.90 the amount of the annual premium, but plaintiff in open court waived her right to a verdict and judgment for said sum of $456.90." (Assignment of Error XII, Tr. 66–68.)

13. There is no material and substantial evidence tending to sustain the verdict of the jury (Tr. 72–322; Assignment of Error, Tr. 68).

14. The verdict of the jury was contrary to the law (Assignment of Error XIV, Tr. 68).

BRIEF OF ARGUMENT.

The judgment for plaintiff is not warranted, is unjust and should be reversed. We do not believe it

possible, in this age of our boasted civilization and the integrity of our judicial system for the just settlement of controversies, such a judgment can stand.

The jury, following the all but universal course in cases where the plaintiff is a widow and defendant a corporation, returned their verdict for the plaintiff. The trial court, as is the usual rule, denied the motion for a new trial. The result is this writ of error —seeking relief from the unjust, improper and unwarranted judgment.

The evidence of self-destruction is so clear, cogent and convincing, upon any view which can be *properly* taken of it, that reasonable minds cannot reach a different conclusion; if any reasonable, disinterested person, reading the record in this case, would not reach any conclusion other than that the insured committed self-destruction, why should the jury or Court reach any other or different conclusion?

We submit that to allow the verdict in this case to stand is to surrender human intelligence and to trifle with the underlying and undisputed facts in the case.

The rule in reference to the withdrawal of a case from the jury is that where all reasonable men would draw the same conclusion, then the case should be withdrawn from the jury, and if reasonable men would not draw the same conclusion, then the case is one for the jury. However, the application of the rule is conditioned upon the taking of the *proper view* of the evidence, and not merely that reasonable men may draw a different conclusion from the evi-

dence, the conclusion to be drawn is not an unrestrained one, but it must be a *proper conclusion* under the evidence. The fact that the jury reached a conclusion in favor of plaintiff and that the trial court denied the motion for a new trial is not material under the law applicable to and governing the application of the rule. The rule was considered and determined in the case of

American Car & Foundry Co. vs. Duke (C. C. A., 3d Ct.), 218 Fed. 437.

There was a verdict and judgment for plaintiff, motion for new trial denied, upon writ of error reversed upon the application of the rule above stated. At the conclusion of the evidence defendant requested a directed verdict, which was refused; from the opinion (p. 438), we quote:

> "(1) The facts relied upon for the deduction of the defendant's negligence, as first stated, are in the main undisputed, and with respect to them the question before this Court on review is whether they constitute acts from which *all reasonable men* might draw the same conclusion, and therefore, whether the court below *erred in declining* to treat the question of negligence as a question of law and in refusing to withdraw the case from the jury." * * *

The question was whether the negligence was one of fact or of law; the lower court submitted the case to the jury, which found for plaintiff, thus convicting defendant of negligence; motion for new trial was denied.

The appellate court held

> "that the court below committed error in refusing to find, as a matter of law, that Duke was chargeable with the negligence that caused his injury, and in failing to bind the jury to return a verdict for the defendant." (P. 442.)

The jury and the trial court did not draw the same conclusion from the evidence as did the appellate court; in discussing this question at p. 442 the appellate court said:

> "In reaching a conclusion in this case we recognize the correctness and propriety of the rule of law that a case should not be withdrawn from a jury where upon a given state of facts reasonable men might differ as to whether there was negligence or not. In such a case, negligence is a question of fact and being such is to be determined by the jury and not by the court; but where the facts are such that from them all reasonable men would draw the same conclusion, and that upon the testimony no recovery can be had upon any view which can be *properly* taken of it, then the question of negligence ceases to be one of fact for the jury, and becomes one of law for the court to determine. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Sealey v. Southern Ry. Co., 151 Fed. 739, 81 C. C. A. 282; Bush v. Hunt, 209 Fed. 164, 126 C. C. A. 112; Myers v. P. C. Co., 233 U. S. 184, 193, 34 Sup. Ct. 559, 58 L. Ed. 906.

"In our opinion the conduct of Duke, in view of what he did, saw, and admitted to have known, amounts to misconduct, about which *reasonable men* cannot draw different conclusions, and we are of opinion that the court below committed error in refusing to find, as a matter of law, that Duke was chargeable with the negligence that caused his injury, and in failing to bind the jury to return a verdict for the defendant.

"The judgment below is reversed, and a new venire is awarded."

We urge in the case at bar reasonable men could not upon any view which can be *properly* taken of the evidence in this case reach any other than the same conclusion, to wit, that Neasham destroyed himself; that jurors, influenced by anything other than the evidence, should not be permitted to reach a different conclusion and have that conclusion stand as a verity in the case. The Court in the case of Agen v. Metropolitan Life Ins. Co. (Wis.), 80 N. W. 1020, 1023, says,

"The jury could not have said *as men,* that the circumstances did not show suicide so as to leave no reasonable probability to the contrary; therefore it was not permissible for them to say it *as jurors* and have that stand as a verity in the case. The Court should have granted the motion to direct the verdict, and, failing in that, should have set the verdict aside and granted a new trial."

The judgment was reversed.

In the case last cited the Court quotes from a previous decision as follows:

> "There is but one reasonable inference that can be drawn from the evidence; that to attempt to draw any other would amount to a *pitiable stultification of the reasoning powers.*"

In discussing judgment and its incidents, the learned author in Cooley's Blackstone, 3d ed., Vol. 2, p. 398, says:

> "Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress."

There is no material and substantial evidence, if indeed there is any evidence, showing, or tending to show, that deceased was not guilty of self-destruction. It appears clearly and conclusively from the pleadings, opening statement by plaintiff's attorney and the evidence that the deceased died from a gunshot wound of head and brain through the soft palate of the mouth and the base of the brain, without injury to lips, teeth or tongue, and that death was instantaneous; that the entrance of the gunshot wound

was so located way back in deceased's mouth so that it could not be reached or seen without depressing the tongue; that the clothing worn by deceased, when found, was in perfect order; that there were no fresh cuts, contusions or abrasions of the skin upon the body other than the wound in the mouth and at the back part of the head; that there were no tracks leading to the place where the body lay, except one line of tracks, which, of course, were made by Neasham himself as he walked to the spot; there were no tracks leading from the spot where the body lay; that Burke, the experienced officer, witness for the plaintiff, searched the place and roundabout for, but did not testify as to the finding of, any evidence of other persons having been there or of a struggle having taken place; that other witnesses gave testimony establishing that no other persons had been to the body and that no struggle had taken place; deceased was a big and powerful man, armed with a loaded 32-caliber Savage automatic pistol, all of which lead to but one logical, reasonable conclusion, to wit, self-destruction.

Considering the errors specified, and in their order herein stated, we submit the following:

Specifications and Assignments of Error Nos. I, II and III, Tr. 52–56, may be considered together; same being respectively concerning demurrer to the complaint, motion at close of plaintiff's evidence for nonsuit and for a directed verdict and the ruling of the Court as to the burden of proof under the pleadings, opening statement of plaintiff's attorney and

plaintiff's proof in chief, as hereinabove particularly specified.

Plaintiff in her complaint made the policy or contract, the foundation of the action, a part thereof, thereby making the "self-destruction" clause in the contract a part of the complaint, but the only allegation in the complaint in reference thereto was that the insured died—"how," it was not stated. To the complaint defendant demurred because it was ambiguous and uncertain in that it does not appear whether the insured was or was not guilty of self-destruction; that the complaint does not state facts sufficient to constitute a cause of action; the demurrer was overruled and defendant in its answer alleged "how" insured came to his death, to wit, that he "destroyed himself, and then and there died as the result of a self-inflicted gunshot wound." This issue was met by denial on behalf of plaintiff, and plaintiff asserted her version as to "how" insured came to his death by alleging in her reply "that her husband, William C. Neasham, the insured named in said contract * * * came to his death * * * from a gunshot wound inflicted upon him at the hands of some person or persons unknown to the plaintiff."

We have, therefore, by the pleadings, the admitted fact that death came by reason of a gunshot wound —defendant maintaining that it was self-inflicted, while plaintiff maintained that it was inflicted by some person other than the insured; in other words, defendant contended self-destruction, plaintiff contended murder. Under the contract sued upon, cer-

tain conditions precedent enter and determine the extent of the liability of the defendant upon death of the insured; before there was any liability for any amount whatever under the contract, death of the insured must exist or happen; the extent of the liability upon the happening or existence of death was dependent or conditioned upon the existence or happening of other conditions; if insured died from pneumonia, typhoid or any other fever, the means of death, the existence or happening of the thing which caused death, would determine the liability, nothing else appearing, as the face of the policy, while if self-destruction exists or happens, then the liability of defendant, nothing else appearing, would be a sum equal to the premiums paid thereon and no more. The *cause* of death, under the contract, determined the amount the beneficiary was entitled to receive; no estate or right of action to any extent vested in beneficiary until the happening of the death and the *extent* of the estate or right of action which vested upon the death was determined, by the terms of the contract, according to the *cause* of the death.

> "If the thing conditioned is to exist or happen before the estate is to vest, the condition is precedent; if after, it is subsequent."
>
> 12 C. J. 409.

The means or cause of death, self-destruction or other causes, being a condition precedent, under the contract, to the determination of the extent of the estate of the beneficiary, plaintiff was required to allege and prove the conditions precedent, cause or

means of death other than self-destruction, which, if true, would entitle her to a judgment for the face of the policy.

Failing to so allege in the complaint, plaintiff did in paragraph V of her reply allege:

> "V. For a further reply * * * plaintiff alleges that * * * the insured named in said contract * * * came to his death * * * from a gunshot wound inflicted upon him at the hands of some person or persons unknown to plaintiff." (Tr. 15–16.)

Thereby, whatever may be the effect of failure to plead the matter in the complaint, casting the burden upon plaintiff to establish the alleged cause or means of death, murder, before plaintiff was entitled to a judgment upon the alleged cause of action for $10,000. Plaintiff offered no proof whatever to establish the allegation and the issue thus joined (Tr. 72–84). Defendant at the close of all the evidence offered by plaintiff moved for a nonsuit and directed verdict (Tr. 84–87). The motion was denied upon the theory adopted by the trial court that plaintiff had made a *prima facie* case, and that the burden of proof was upon defendant, as more clearly appears in Assignment of Error III (Tr. 55, 56).

It is and must be the law that the burden of proof was upon the plaintiff to prove that the death resulted from a cause which, under the contract, entitled the beneficiary to recover the amount sought, as the specified amount due upon the happening of certain conditions.

The plaintiff had no absolute cause of action for $10,000 under the policy made a part of the complaint upon the death of the insured; because the contract itself, by the terms of the self-destruction clause, shows that Neasham was not insured for $10,000, if during the first insurance year he committed self-destruction; the insured died from a gunshot wound through the roof of his mouth into the brain during the first insurance year; seeking to recover by her action the $10,000 which became and only became the amount of the insurance in the event of death from causes other than self-destruction during the first insurance year, the cause of death was a condition precedent, required to be pleaded and established.

The provision concerning self-destruction in the policy is not a provision cutting down the amount of insurance, but is a clause providing for the payment of a specific amount on the happening of the contingency therein named.

Scales v. National Life & Accident Ins. Co. (Mo.), 186 S. W. 948.

Paragraph 4 of the syllabus reads:

"A provision in an accident policy, providing for payment of only one-fifth of the face of the policy for death by being poisoned, does not cut down the amount of insurance, but is a mere clause for payment of a stipulated sum on the happening of a certain event."

Fondi v. Boston Mutual Life Ins. Co. (Mass.), 112 N. E. 622.

The jury was instructed:

> "The burden of proof in this case to show that this policy has been avoided by breach of the condition referred to, rests upon the defendant. That is, unless he satisfies you by a fair preponderance of the evidence that the conditions of the policy are broken, then you should bring in a verdict for the plaintiff."

The Supreme Court upon exceptions held that the instruction was error; that the condition therein referred to was a condition precedent and that the burden was upon the plaintiff; citing authorities.

> Fidelity & Casualty Co. v. Weis (Ill.), 55 N. E. 540.

That the burden of proof upon the whole case was upon the plaintiff under the pleadings and opening statement of plaintiff's attorney, we cite:

> Weil v. Globe Indemnity Co., 166 N. Y. Supp. 225.
>
> American Accident Co. of Louisville v. Carson (Ky.), 36 S. W. 169, dealing with necessary allegations on part of plaintiff.

Specification and Assignments of Error IV and V, Tr. 56, 57, to the effect that the Court erred in sustaining objections to questions propounded to Doctors Gibson and Morrison, witnesses for defendant as appears Tr. 199, 200, 202, 209, 210, 211.

The questions, to which objections were sustained, propounded to Dr. Gibson, are:

> "(Q.) Can you state the difference between a gunshot wound, or a pistol-shot wound, made

by the pistol being fired close to the object that it strikes, and when it is some distance from the object?" * * *

"(Q.) If a pistol-shot was fired with the pistol close to the anatomy of a human person, right up close to it, would there be any difference between the character of the wound thus made and the character of a wound received by a bullet from the same pistol, fired at some distance from that object?" * * *

"(Q.) Doctor, from your experience in the practice of your profession, and from your observation in this examination, what is your opinion as to whether this wound was inflicted by the deceased, or by some one else?" * * *

And the questions, to which objections were sustained, propounded to Dr. Morrison, are:

"Q. Assuming that testimony to be true, state whether or not, in your opinion, that wound could have been made by a gunshot fired at some distance from the mouth of the deceased?" * * *

"Q. Assuming the testimony of Doctor Gibson as true, particularly referring to the location of the wound, and the fact that the tongue, teeth and lips were not injured, would it, in your opinion, be possible to have inflicted that wound by a bullet fired from a thirty-two automatic pistol, with the pistol outside the mouth of the deceased?" * * *

"Q. Assuming the testimony of Doctor Gibson as true, I will ask this question, your Honor,

to make the record—what is your opinion as to whether or not the wound was inflicted by William C. Neasham himself, or another?"

In support of the competency of such questions, and that the Court erred in sustaining objections thereto, we cite:

Thomas v. State (Tex.), 74 S. W. 36.

In a prosecution for murder, the witness testified that the wound in deceased's breast was a round hole, about the size of a guinea egg; that from an examination of the wound the gun used by the defendant was, in his opinion, fired within a few feet of deceased. Held, competent for witness to so testify without qualifying as an expert.

Miller v. State (Okl.), 132 Pac. 717, L. R. A. 1915A, 1088.

The following question, "What is your opinion as to whether the wound was inflicted by Jane Schneck herself or by another?" was held to be proper.

Streight v. State (Tex.), 138 S. W. 742.

State v. Asbell (Kans.), 46 Pac. 770.

It was held that a medical expert, qualified by study and experience, who examined the body of the deceased shortly after the wound was received, may give his opinion as to whether it was produced by a near shot or one fired from a distance.

"On any subject not within the common knowledge and experience of men of common education in the ordinary walks of life, an expert witness may be asked the cause of a casualty, * * * even though it be the precise question upon which the jury are to pass."

Abbott's Trial Brief, Mode of Proving Facts, 2d ed., 223.

The above having particular application to the fact that the wound was located in an unusual place, through the soft palate of insured's mouth, without injury to the hard palate, lips, teeth or tongue of deceased, resulting in a large, ragged crater-like opening as shown by the undisputed testimony of several witnesses.

Specification and Assignment of Error VI, Tr. 58, *in re* admission, over objection, of testimony of Burke, witness for plaintiff as to what he saw upon the ground February 28th, the day after the insured destroyed himself, as claimed by defendant, or was murdered, as claimed by plaintiff.

The admission of the testimony of witness Burke, as to what he discovered upon the ground February 28th, over defendant's objection, was prejudicial error. This clearly appears from the record.

The importance of this error is shown by the fact that the jury, after deliberating about two hours, returned into court and asked "to have ex-Sheriff Burke's evidence read as to the tracks he testified to having found on the railroad" (Tr. 301). Thereupon the reporter read to the jury what purported to be said testimony of witness Burke, as appears Tr. 303. We have set out above in the specification of this error such testimony and commented thereon, to which testimony and comment reference is made without repeating here.

In addition it appears from the record that not only the jury gave particular and important consid-

eration to the testimony of witness Burke, but it appears that the trial court, in denying the motion for new trial, relies largely upon such testimony so given by Mr. Burke (Tr. 24, 25). In fact, it appears from the opinion of the trial court (Tr. 18–42) that the motion for new trial was denied largely upon such testimony of Mr. Burke, and the purported testimony of Sheriff Ferrel before the coroner's inquest, which said testimony was admitted over objection and exception of defendant next herein referred to.

Specification and Assignment of Error VII, Tr. 58, 59, concerning error of the Court in permitting plaintiff, over defendant's objection, to offer in evidence what purported to be testimony of Sheriff Ferrel before the coroner. The testimony and the record page thereof, Tr. 251, 252, is set out and referred to above in the specification of this error.

The importance of this error is emphasized, as in the case of the admission of the testimony of witness Burke, from the fact that the jury, after having deliberated ~~over~~ about two hours, returned into court (Tr. 301), and asked "to have read the transcript of Sheriff Ferrell's evidence before the coroner's jury." The record was so read (Tr. 301, 302), as we have hereinabove set forth.

That the reading of such record was prejudicial to defendant, both before the jury and the trial court, is evident from the record; the trial Court, in its opinion denying the motion for new trial, lays great stress upon the so-called record; upon such record the trial Court, in its opinion (Tr. 25), says,

there was a discrepancy in the evidence as to the condition of the pistol found by the body of the deceased and the number of unexploded shells it then contained. The only evidence that could be considered as the basis for the statement that there was a discrepancy would be the purported record testimony of Sheriff Ferrell before the coroner, referred to and discussed by the trial court (Tr. 26); without the purported testimony of Sheriff Ferrell, before the coroner, in the record there would be no discrepancy of any nature or kind in the evidence—the admission of such document in evidence we urge was great and prejudicial error.

There is no statute providing that such testimony taken before the coroner shall be evidence in any proceeding of any nature or kind whatsoever. The paper produced, "In the Matter of the Inquisition upon the Body of William C. Neasham, Deceased," was not signed by witness Ferrel; the witness Ferrel stated emphatically and positively that he did not give such testimony; this testimony was put in for the purpose of impeaching the testimony of said witness Ferrel; therefore, in order to show what Ferrel's testimony was before the coroner, it was necessary to produce his testimony there in a way which could not be impeached. The document produced and read from for that purpose is not authorized by any statute to be evidence in any proceeding.

The statute of Nevada covering this matter is sec. 7550, Revised Laws, and reads as follows:

> "The testimony at such an inquest shall be reduced to writing by the justice of the peace, act-

ing as coroner, or as he may direct, and by him, without delay, filed in the office of the clerk of the District Court of the county."

We submit that witness Ferrel should not be bound by someone else's statement of what such other person claimed his testimony was without Ferrel having ever seen what this statement was, without his ever having assented to it, and without the party claiming to furnish such testimony submitting himself for examination. No one testified that the statement contained in the document offered was the testimony of witness Ferrel. As the record now stands, the document purporting to be the testimony of witness Ferrel before the coroner is the merest hearsay, not binding on the witness or anyone else, yet it was admitted over defendant's objection.

We submit that the admission of said purported testimony was clear prejudicial error.

In support of our contention, we cite the following authorities:

State v. Hayden, 45 Iowa, 11, 14, 15.

Paragraph 2 of the syllabus reads:

"EVIDENCE: IMPEACHMENT. The minutes of evidence given before the grand jury, or of that submitted upon preliminary examination, are not admissible upon the trial for the purpose of impeaching a witness."

From the opinion (pp. 14, 15), we quote:

"But the minutes of a witness' testimony before a grand jury, and the substance of his testimony taken before an examining magistrate, are in no proper sense the writing or the act of the

witness. It is the duty of the clerk of the grand jury to take and preserve the minutes of the proceedings, and of the evidence given before it. Code, sec. 4275. The witness *is in no way connected with the act of taking these minutes of his testimony, they are not required to be read over to him, nor to be signed by him.* Unlike a deposition or affidavit, they do not purport to give statements of fact in full, but are what the law requires, mere 'minutes.' They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the District Bench has enabled the writer hereof to observe that the evidence taken before grand juries is often of the most indefinite and uncertain character, *and if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice.*

"What we have said in regard to the evidence taken before the grand jury *applies with equal force to the evidence taken in a preliminary examination.* Section 4241 of the Code requiring the magistrate to write or cause to be written out the substance of the testimony only. It is not required to be read over to the witness, and is but the act of the magistrate or his clerk.

"Excluding the written minutes or substance of the evidence from being introduced does not prevent an impeachment. The grand jury may be required by the court to disclose the testi-

mony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given before the court. Code, sec. 4285. An examining magistrate, or his clerk, or any person who heard the testimony, *may be called for the same purpose.* It appears that in this case the evidence taken before the grand jury was signed by the witness who was sought to be impeached. It does not, however, appear that the evidence was read over to him, or that he was otherwise made acquainted with its contents at the time of signature."

Redford v. Spokane St. Ry. Co. (Wash.), 46 Pac. 650.

Paragraph 3 of the syllabus reads:

"3. One cannot be impeached by a transcript of the stenographer's notes of his testimony on a former trial, but the stenographer, or some one else who heard the testimony, should be called."

From the opinion (p. 652), we quote the following:

"For the purpose of contradicting the respondent, the appellant offered in evidence what purported to be a certified copy of the transcript containing respondent's testimony given upon the former trial. It was excluded upon respondent's objection, and this ruling is assigned as error. The proper method of impeachment would have been to produce the stenographer or some one else who had heard the testimony given by the respondent on the former trial; ***but a***

transcript of the stenographer's notes was not competent evidence, and the objection was properly sustained. 1 Thomp. Trials, sec. 504; Phares v. Barber, 61 Ill. 271; State v. Hayden, 45 Iowa, 11; State v. Adams, 78 Iowa, 202, 43 N. W. 194."

State v. Adams (Iowa), 43 N. W. 194.

Paragraph 4 of the syllabus reads:

"After defendant's counsel had called the attention of witnesses for the state to the minutes of their evidence taken by a shorthand reporter at the preliminary examination, and to certain discrepancies between them and their testimony on the trial, he offered to read the minutes to the jury, for the purpose of impeaching the witnesses. Held, properly refused; defendant having full opportunity to call the shorthand reporter, and to use his minutes to show what they contained."

From the opinion (p. 195), we quote:

"The defendant was arrested soon after the death of Daring. A preliminary examination was had before a justice of the peace. A shorthand reporter was appointed by the justice to take down the minutes of the testimony. Upon the trial, the defendant's counsel called the attention of a number of the witnesses for the state to the minutes of their evidence, and to certain discrepancies between them and their testimony on the trial. Afterwards counsel offered to read the minutes to the jury, for the purpose of impeaching the witnesses. The

state objected, and the objection was sustained. Counsel claim that this ruling was erroneous. We think otherwise. This Court has expressly determined that question. See State v. Hayden, 45 Iowa, 11. The Court gave to the defendant the fullest opportunity to call the shorthand reporter, and allow him to use his minutes as memoranda, and thus show what they contained. We think the defendant has no reason to complain of this ruling."

Phares v. Barber, 61 Ill. 271, 276.

From the opinion we quote:

"We do not think it error to refuse introduction of the testimony of appellee for the purpose of contradiction as transcribed from a phonographic report of a former trial between these parties. So far as the record shows appellee had never seen this transcript of his evidence, and did not even know of its existence. *It may have been a fair and truthful report of his testimony, and it may not.*

"These reports are taken for the convenience of the parties. The legislature has not declared that they shall be evidence upon the trial, *or for any purpose and we have no power to legislate.*"

Nash v. State (Ark.), 84 S. W. 497.

Paragraph 7 of the syllabus reads:

"On a criminal prosecution it was error to permit a witness to be impeached by reading a part of what purported to be his testimony before the grand jury, it not being proved that

he had read, or heard such testimony read, or that he had so testified."

From the opinion (p. 499), we quote:

> "*The Court erred* in permitting Quilling to be impeached as a witness by the reading of a part of what purported to be his testimony before the grand jury. It was not proved that he had read or heard such testimony read, or that he had so testified. Quilling was an important witness for the defendant, and his impeachment may have been prejudicial."

It is true that the document read from to impeach Sheriff Ferrel purports to be a copy of a public document, and we understand that it was permitted to be used as impeaching evidence for that reason. The only effect given by the statute to a properly certified copy of a public record "is that it may be read in evidence in any action or proceeding in the courts of this state in like manner and to the like effect as the original could be if produced." Sec. 5409 Rev. Laws, Vol. 2. The statute also provides that the record of testimony of any witness stenographically reported *by an official court reporter* may be *only used* when the witness is dead or beyond the jurisdiction of the court. Sec. 5472, Rev. Laws. The objection made to the use of this purported testimony as impeaching evidence, is in no wise cured by the fact that it became a public record. That objection *goes to the competency of the original* and if the original is incompetent, of course the fact that it had become a public record, or was properly certified as such, does not make the copy competent evi-

dence, if the original is not. Further, there is no testimony that the record introduced in evidence was stenographically reported by an official court reporter, and it appeared that the witness was not dead or beyond the jurisdiction of the court. These two matters being referred to in sec. 5409, Rev. Laws of Nevada, above mentioned.

Specifications and Assignments of Error VIII, IX and X, Tr. 59–62, XII, XIII and XIV, Tr. 66–68, in reference to the motion for a directed verdict at the conclusion of all the evidence, and to defendant's requested instruction No. 1 and to defendant's requested instruction No. 2, and that the verdict is not sustained by the evidence, hereinabove specified, may be considered together.

We have under statement of the case herein set forth, considered ~~jointly~~ generally and more or less specifically the pleadings and contentions of the respective parties, and the evidence in this case, to which reference is hereby made without repetition thereof.

In making the motion for a directed verdict, and in presenting the matter now upon writ of error, the distinction between the function of the trial court in directing a verdict and in granting motion for new trial is recognized. That distinction is considered by this Court in the case of

> Smith-Booth-Usher Co. v. Detroit Copper Mining Co., 220 Fed. 600.

In the opinion the Court, after citing and quoting from three cases, at p. 603, says:

> "The following decisions, and many others that might be cited, have definitely and dis-

> tinctly established the rule that if there is any *substantial* evidence dealing upon the issue, to which the jury might *properly* give credit, the Court is not authorized to instruct the jury to find a verdict in opposition thereto."

Tested by these rules, we submit that on a careful consideration of the evidence in this case, the verdict should have been directed for defendant.

In Mt. Adams E. P. Inclined Ry. Co. v. Lowry, 74 Fed. 463, being one of the opinions cited by this Court in the Smith-Booth-Usher Company case, *supra,* Judge Lurton, at p. 465, said:

> "The question, when a motion to direct a verdict is made, is this: Is there any *material and substantial evidence,* which, if credited by the jury, would in law justify a verdict in favor of the other party?"

We urge, in the case at bar, there is no material and substantial evidence which would in law justify a verdict in favor of plaintiff, and, therefore, the verdict should have been directed for defendant.

That the insured came to his death from a gunshot wound, and within the first insurance year, is alleged and admitted by the pleadings; also it is established by plaintiff's proof in chief, particularly the proofs of death, Physician's Statement No. 2 (Tr. 310, 311), where it is stated that the immediate cause of death was "gunshot wound of head and brain. Death was instantaneous." We have above considered the insufficiency of the allegations of plaintiff's complaint, tested by the demurrer filed. Also we have pointed out the allegations in defendant's answer and plain-

tiff's reply thereto, making the issue as to how, by what means, the gunshot wound causing the death of insured was inflicted, defendant's contention being that it was self-inflicted, thereby constituting self-destruction under the contract sued upon; plaintiff's contention by her pleadings and by the opening statement of her attorney (Tr. 75), that the gunshot wound which was the cause of insured's death, was inflicted by persons other than the insured, thereby constituting murder. It is true that there is a presumption of law against self-destruction; it is likewise and also true that there is a presumption of law against murder; the presumption, therefore, of law in the case does not aid either party concerning the issue thus made by the pleadings. And as we have pointed out above, citing authorities to that effect, the burden of proof was upon the plaintiff to establish the means or cause of death alleged by her, to wit, murder, and upon this issue we submit that the record is barren of any evidence, much more so is it barren of any *material and substantial* evidence, justifying the Court in sending the case to the jury or justifying the verdict in favor of plaintiff.

Briefly, the record shows, that the insured was not seen at his home from Friday evening about six o'clock until some time next morning, when the members of the family got up. Evidently insured did not spend Friday night at home; if he had been there undoubtedly he would have been seen, but no one of the family testifying, to wit, Mrs. Neasham, the wife and plaintiff (Tr. 148), the son Edward (Tr. 124, 125), the ward, Ray Cool (Tr. 225), saw

the insured between Friday evening about six o'clock and next Saturday morning when they got up; the son admitted that he testified at the coroner's inquest that his father did not come home Friday night (Tr. 125). Singular, isn't it, that this family man, this home man, would leave his home at six o'clock Friday evening and not show up until some time next morning without some producing cause. Did he explain to his wife where he had been the night before? Of course not, or plaintiff's attorney would have produced in evidence such explanation. Where was the insured, and what was he doing between the time when he left home Friday evening at six o'clock and the next morning when he returned to his home? About six o'clock Friday evening, evidently immediately after he left his home, we find the insured purchasing and being shown how to operate a Savage automatic 32-pistol, and when informed that there were not enough shells to fill it, saying "there would be plenty" (Tr. 111–113). Where the insured spent Friday night the record does not disclose; it is singular he did not tell his wife if his absence was not because of somethng unusual; indeed, if the absence had been caused by something unusual which was not a matter that he wished to conceal from his wife, much more would he have explained, and if he did tell, it is indeed singular that the wife did not testify concerning same. In this same connection we direct attention to the record (Tr. 242–243), testimony of the daughter concerning her testimony before the coroner's inquest, which she says

she did not remember, concerning business worries of deceased.

Insured left his home Saturday morning about 8:30 o'clock and alone walked down the railroad track from Reno towards Sparks, where he was found in the gravel or oil pit or cut alongside the railroad track unconscious, all but dead, with a gun-shot wound through the soft palate of his mouth, ranging a little upward, and a star-shaped fracture of the back part of the skull where the bone was pushed out; the Savage automatic pistol which he had purchased the evening before lying within from three to eight inches from his right hand, the handle of the pistol next to his right hand, and the barrel partially filled with the soft sand or dirt of the slope of the bank of the cut; an empty shell, 32-caliber, close by the 32-automatic pistol, the hammer of the pistol back, and a loaded shell in the chamber, the pistol ready to shoot by simply pulling the trigger; blood oozing from the mouth and nose of insured, pulse still beating; clothes in perfect order, including necktie and collar, and even his hat was within about ten inches of his head, where it had evidently fallen as the body fell from a sitting posture upon the shot being fired into the mouth of the insured; not only was the clothing in perfect order, but there was found upon the body "money to the value of two dollars and a half; one Parker fountain-pen, one pocket comb and case; one gold watch, which had a label of R. Herz thereon; a chain and charm; one pocket-knife; one purse; * * * books, papers, letters, one lead pencil, and stick-pin" (Tr. 99, 100).

With all these separate articles being found intact upon the person of the deceased and the clothing being in perfect order, as shown by the testimony, can any reasonable person say that deceased had engaged in any struggle of any kind, much less in a "close, deadly struggle with an assailant," remembering that deceased was a powerful man, about forty-eight years of age, six feet tall, and weighing 200 pounds, and the body being found with the clothing in perfect order and with all the articles above mentioned in his pockets? Certainly, in any struggle of any nature, more particularly a struggle for the preservation of life, the clothing, articles and body of deceased would not have been left in such perfect order. Further, the ground surrounding the vicinity where the body was found was examined by officers of the law and others seeking to discover any evidence of foul play, yet nothing of that character was discovered. The coroner (Tr. 99), testified: "I saw no other tracks or footprints in the immediate vicinity where the body lay; the only foot-tracks were the foot-tracks of one person, that led to where the body lay. * * * The ground showed the tracks distinctly and clearly" (Tr. 100). Burke, an experienced police officer, witness for plaintiff testified: "I examined the ground about the place for tracks, or for any indications I might find of other people having been there, or any indication I might find of a struggle having taken place there" (Tr. 233, 234), but he gave no testimony of having found any indication "of any struggle having taken place there."

Sheriff Ferrel, having served as sheriff of Washoe County "something over nine years," investigated the surroundings when he arrived upon the scene and testified (Tr. 158):

> "Arriving at the scene, I found three tracks leading down to where the body was lying; one track leading to the spot, two other tracks leading to within about eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning. * * *
>
> "I examined the north bank of the cut to see if any human tracks had come down there; seeing none, I examined the south bank, and found none there; I examined for a number of feet around the body, *possibly fifteen or twenty feet;* I saw no other tracks other than what I mentioned."

Evidently the tracks other than "the only foot-tracks were the foot-tracks of one person, that led to where the body lay," as testified by the coroner (Tr. 99), which were discovered by the keen, observing sheriff, as above set forth, were not fresh tracks and were not tracks as described by the coroner when he said, "The ground showed the tracks distinctly and clearly" (Tr. 100), but were evidently old tracks in a measure indistinct and faint.

That these lines of tracks referred to by the sheriff were not made by Lalonde, Brown or Rudolph, or either of them, being the persons who first discovered the body, and that neither of said parties went down into the oil or gravel pit at all until after the sheriff's

party had arrived, is clearly shown by the record.

Testifying as to what happened before the sheriff arrived, Brown, replying to the question, "Did the three of you, or any of you, go down to the pit?" said: "No, we didn't go down to the pit. We just went to the bank and looked over, and this young man was with me. He walked down to the edge of the bank and said he thought he seen a revolver there" (Tr. 119).

Lalonde, who discovered the body (Tr. 114, 115), testified:

> "A. I came from Sparks Saturday morning, and I came along the track, and I noticed a man laying there; he was below the railroad track, and when I got closer to him I heard him snoring very heavily, so I stopped to look. I thought there was something wrong with the man who laid there very still, so I stood around a few minutes, and two men came up, and I called their attention to it; they ran over, and we stood and looked down. I stepped around a little and I saw the gun. So I mentioned that we would have to give word to somebody, and there was two of us went down within six feet of him, and looked at him six feet distant, so then we went right away to Coney Island, and went in a private house over there, and telephoned. We waited awhile, and then we walked over to where the man was laying, and we still waited for the sheriff to come, and the man was dead then."

The pit at the bottom of which the body lay was about fourteen feet deep (Tr. 151). The body, about six feet in length, reclining up the bank of the cut so that the head of the body must have been at least eight feet below the top of the cut (photograph, Tr. 317); meeting the top of the cut or pit, the ground sloped from there to the railroad track where the men stood (photographs, Tr. 314, 316, 317 and 318).

Lalonde testified *supra,* "and there was two of us went down within six feet of him" (Tr. 115, 116).

Rudolph, of whom Brown spoke as the "young man" (Tr. 118, 119), testified that he went down to within about eight feet of the body, stating, "the other gentlemen stayed up, and I went down seven or eight feet. I could see he had shot himself, and I went over and telephoned to the police (Tr. 121).

The men standing at the top of the bank of the cut or pit would be within from six to eight feet from the body; thus Brown's statement that none of them went into the pit, but that they just went to the bank and looked over, squares with the rest of the testimony. When the sheriff arrived, none of the men were in the pit. The undertaker who was with the sheriff, testified:

> "As I remember, there was one man met us at the gate from the main road leading into this lane, and directed us the way to go to where Mr. Neasham's body was; and the other two men, as I remember, were on the railroad, standing on the railroad track above where Mr. Neasham was lying in the pit below" (Tr. 177).

Not having been in the pit until they went there with the sheriff and coroner, neither Lalonde, Rudolph or Brown could have made the tracks observed by the sheriff that approached to a point six or eight feet from the body and then turned and went back (Tr. 158). The testimony is uncontradicted; it permits of no other inference.

It is cause for wonder that there were no other inquiries made of these parties at the coroner's inquest regarding their identity. At the trial of this case, the coroner was willing to state why he did not make any further inquiry, and the Court saw no objection to his doing so, but plaintiff's attorney did (Tr. 120). It is significant that he did; he was at the coroner's inquest (Tr. 117), and asked questions there (Tr. 115), and his wife is the sister of plaintiff (Tr. 279); he was more personally interested than anyone else at the inquest in exposing anything that might indicate that Neasham had been murdered—the contention of plaintiff in the case at bar; yet he made no further inquiries regarding the identity of these three men. Why? The answer is not far to seek—he knew, just as did the coroner, the sheriff, the district attorney, that there was not the slightest reason to believe that any of these men had anything to do with Neasham's death; and, knowing this, he objected to the coroner's elaborating the truth in the presence of the jury.

The location of the gunshot wound, entering the soft palate of the mouth, penetrating the base of the brain, pushing out the skull in the back of the head at a point a little above the point of entrance, with-

out hitting or injuring the hard palate of the mouth or the tongue, or teeth or lips, the point of entrance being where it was impossible to see the wound without depressing the tongue, and after the body was cold it being impossible to depress the tongue so as to see the injury or wound, the wound being a large, crater-like, ragged opening caused by concussion, the explosion of the shell—demonstrates to the exclusion of any other reasonable or intelligent inference that the muzzle of the pistol was in the mouth of Neasham at the time the shot was fired.

The condition of the bank of the gravel-pit or cut at and above where the body was found, the condition of the clothing, the position in which Neasham's hat was found, about ten inches from and to the right of his head, in the direction it would naturally fall from his head when he fell over after he shot himself, the location of the pistol which he had purchased the evening before, the unobstructed view along the railroad tracks (photographs, Tr. 315, 316, 317 and 318), demonstrates to the exclusion of any other reasonable or intelligent inference that Neasham was not attacked while upon the railroad track, and then thrown or pushed over or down the embankment into the pit.

The scar, dent, or depression on deceased's forehead near the hair-line was the subject of testimony by witnesses offered by plaintiff, such witnesses being members and relatives of the family, the ward of deceased and the family physician, such testimony being to the effect that they had never, prior to his death, observed this mark on the forehead of de-

ceased. We have above referred to the testimony and the page of the record where found. Disinterested witnesses, those who were in no way connected with either party to the litigation nor interested therein, described the mark as a white line, an old scar which had healed; referring to the record and the testimony of Chick, the undertaker, this is described as a scar, a white streak, there was no black and blue place there, no cut, no abrasion of the skin, no blood there (Tr. 174); it was very slight, it was more like a white streak in the flesh where it had healed (Tr. 185); the scar was whitish in appearance (Tr. 185); it looked old, there was no blue or black place around the vicinity of the whitish looking scar (Tr. 186); that he bases his judgment that it was an old scar on that as upon previous scars that he had seen (Tr. 187).

Similar in effect was the testimony of Dr. Gibson. Dr. Ascher, the family physician, did not notice this scar at all until his attention was called to it, even then he didn't pay much attention to it—is it possible that it would have been treated in such a light manner if indeed it had been anything other than an old scar that had healed? Sheriff Burke, in examining the body at the undertaker's, did not observe any other than the wound in the mouth (Tr. 233).

Plaintiff, the widow of deceased, was upon the witness-stand three different times, yet she was asked nothing concerning this scar, dent or depression. It is a presumption in law that where a party is present at the trial and has information concerning facts

being inquired about and is not asked in reference thereto, that the testimony of such witness would be adverse to the fact sought to be established. Why was not the widow asked by her attorney concerning this white scar, when it occurred, when she first knew of its existence? The negative testimony of others, interested in the success of plaintiff in the case, concerning this scar, may be included in the word, recently brought into common use, "camouflage." It seems, however, to have served its purpose along with the charge of the Court to the jury where the jury was authorized to consider the question of accident, mischance, and "if in your examination of this evidence you conclude you cannot account for the death of this deceased in accordance with the theory advanced by either counsel, but you can account for it in accordance with some other theory which you believe the evidence warrants, you are at perfect liberty to find your verdict according to such theory as suggests itself to your judgment" (Tr. 298). The theory advanced by either counsel was as made by the pleadings and as made by plaintiff's attorney's opening statement, that it was a case of self-destruction or murder, but by the instruction given the jury they were at liberty to disregard and discard the issue joined and return a verdict upon some other theory. Upon what theory the verdict was returned, the record is silent.

In order to compel the jury to return a verdict within the issues made and not upon some other theory, defendant's counsel, at the close of all the evidence and before the argument and before the

charge to the jury, requested the Court to submit to the jury for determination two questions of fact, said questions of fact so requested reading:

> "a. That the insured, William C. Neasham, came to his death from a gunshot wound self-inflicted.
>
> "b. That the insured, William C. Neasham, came to his death from a gunshot wound inflicted by some person or persons other than himself." (Tr. 47, 48.)

The Court refused to submit to the jury said questions of fact. Such refusal was assigned as one of the grounds for a new trial in defendant's motion for a new trial as appears Tr. 47, 48.

We appreciate that in a trial in the Federal Court a party has no legal right to demand special findings as is the law in some states; that such refusal is not a matter for which error may be assigned, and no error has been assigned because of such refusal.

Section 5222, Rev. Laws of Nevada, authorizes the submission to the jury of such questions of fact.

In Moore v. Northwestern Mutual Life Ins. Co. (Mass.), 78 N. E. 488, 489, the Court submitted to the jury the question, "Did the deceased, Walter T. Moore, die intentionally by his own act?" The jury answered, "Yes."

No case has been cited, and we know of none, where the evidence was so clear, cogent and conclusive, where all the physical facts, the location of the gunshot wound causing the death of insured was in the mouth of deceased, as in this case, where the verdict for plaintiff has been permitted to stand. All

cases cited in the opinion of the Court denying the motion for a new trial are easily distinguished from the facts in the case at bar.

Hodnett v. Aetna Life Ins. Co., 87 S. E. 813. Judgment was for the defendant, on error affirmed. From the opinion we quote:

> "The deceased was found, * * * dying from a bullet wound. He was breathing, but unconscious, and was bleeding profusely from the mouth and nose, and also from the top of the head. He was lying stretched upon the floor and a pistol was found about five or six feet from his body. * * * The only wound upon his body, except a slight powder burn on one of his hands, was through the roof of his mouth. The hole, the point of entrance, as testified to by all the experts examined, was inside the mouth, and was large enough to insert therein a man's index finger, which the expert witnesses declared established that the wound must have been inflicted at very close range. There were no powder marks or wounds of any nature upon the lips or teeth. * * * In our judgment, the evidence, and *especially as to the physical facts,* surrounding the death of the deceased, was sufficient to overcome the presumptions of law that the deceased did not kill himself, or that, if he did, it was not intentional, but accidental, and to demand a finding that he *came to his death by his own intentional act.*"

State Mutual Life Ins. Co. v. Long, 178 S. W. 778.

Moore v. Northwestern Mutual Life Ins. Co. (Mass.), 78 N. E. 488.

Agen v. Metropolitan Life Ins. Co., *supra* (Wis.), 80 N. W. 1020.

American C. & Foundry Co. v. Duke, *supra* (C. C. A., 3d Ct.), 218 Fed. 437.

Walters-Pierce Oil Co. v. Van Elderen (C. C. A., 8th Ct.), 137 Fed. 557, 569, the Court says:

> "The now better recognized rule is that, where the evidence in support of a given situation or fact is overwhelmingly persuasive, it is not to be maintained that any evidence to the contrary, however inconsequential, and improbable, should carry the case to the jury for their determination."

In the case last cited, a witness testified that he saw a man at a certain time at a certain place. Under the facts disclosed it was held that the testimony was not entitled to any consideration whatever.

Western Union Tel. Co. v. Baker (C. C. A., 8th Ct.), 140 Fed. 315, 319.

Missouri K. & T. Ry. Co. v. Collier (C. C. A., 8th Ct.), 157 Fed. 347, 353.

United States v. Sixty Barrels of Wine, 257 Fed. 846, where a chemical test of wine was held to overthrow positive testimony as to the kind of wine contained in the barrels.

Dagger v. Van Duck, 37 N. J. Eq. 130, 132.

Moore on Facts, Vol. 1, Sec. 149.

McLeod v. Miller & Lux (Nev.), 153 Pac. 566, 570. Paragraph 2 of the syllabus reading:

> "Where the testimony of witnesses is refuted by physical law, or matters of common knowledge, no probative force can be allowed such testimony."

Ziebell v. Fraternal Reserve Assn. (Wis.), 149 N. W. 475–476.

Modern Woodmen of America v. Kincheloe (Ind.), 94 N. E. 228. In the opinion the Court says:

> "But if the record discloses *no fact* inconsistent with the conclusion of death by suicide, the verdict will fall for lack of the proper support."

Elliott on Evidence, section 2393, *inter alia* says:

> "In proof of suicide the location of the wound is important. Wounds or injuries inflicted for the purpose of self-destruction are usually upon the front or right side of the body."

In the case at bar, the location of the wound, heretofore described, demonstrates to the exclusion of any other reasonable or intelligent inference, that the wound was self-inflicted and for the purpose of self-destruction.

Specification and Assignment of Error XI, Tr. 62–66, concerning instructions given the jury.

There was no suggestion in the pleadings, nor was there any evidence or suggestion of evidence, that Neasham's death was the result of an accident or mischance. The issue joined upon this question was —self-destruction, as provided in the contract, main-

tained by defendant, and that he was shot by some other person, maintained by plaintiff; furthermore, the location of the gunshot wound in the mouth was positive, affirmative evidence, demonstrating to the exclusion of any other reasonable or intelligent inference, that the shot was not by accident or mischance; is it reasonable to say that Neasham, while sitting on the sloping side of the cut, put the barrel of the loaded and cocked pistol way back into his mouth by accident or mischance, and while it was there that he pulled the trigger and shot himself by accident or mischance.

Is such a proposition to be seriously considered in our high courts? We can understand how, during the rush and excitement of a trial, the Court may and frequently does erroneously admit or exclude evidence, and also err in the giving of instructions—such we submit was done in this case—to cure both of which we are appealing to this Court in its calm and deliberate judgment.

There was nothing in the pleadings or in the evidence suggestive of accident or mischance—no man exercising ordinary common intelligence, or intelligence even of a lower degree, could infer from the evidence under the issues that Neasham *accidentally* or by *mischance* shot himself. It is apparent that the muzzle of the gun when fired was placed far back in his mouth. Is that the way a man handles a gun when he *accidentally* or by *mischance* shoots himself? Never!

The charge of the Court, therefore, in submitting to the jury the question of accidental death or death

by mischance was without the issues and without any evidence and was error, prejudicial to the defendant, to which exception was taken at the trial (Tr. 300).

As to accidental death or death by mischance, the Court, in its charge to the jury, said:

> "The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to overcome the presumption of the innocence of the deceased of the wrong involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, *rather than accident, mischance,* or violent injury inflicted at the hands of another." (Tr. 291.) "If one is handling a deadly weapon or other instrumentality, in a negligent and careless manner, and as a result *is accidentally killed,* in such an instance, although death results from his own act, *it is not self-destruction,* or suicide *such as to excuse a defendant's liability,* for the intent is absent. In such case it is what is denominated as *accidental death.*" (Tr. 292). "If, on the other hand, the jury find that the shooting was done by the deceased, but that it was done *accidentally,* or was the *result of carelessness,* and without the intent or purpose of taking his life, *then under the evidence, the plaintiff will be entitled to a verdict.*" (Tr. 293.)

In Moore v. Northwestern Mutual Life Ins. Co., *supra* (Mass.), 78 N. E. 488, the Court discusses the effect of the old provision, in regard to suicide, in

policies and the construction placed thereon by the courts, and then says (489, 490):

> "To meet the difficulty caused by this conflict of decisions, the words sane or insane were introduced into policies of insurance. * * *
>
> "On reason and on the authorities, we can have no doubt that the old rule is done away with, and that the words 'sane or insane' cover every case of suicide. Of course, a death by shooting may be accidental, *but there is nothing in this case to show any accident.* The evidence shows clearly a case of suicide and it makes no difference what the state of mind of the person committing suicide was."

United States v. Breitling, 20 How. 252, 254, 255, the Court says:

> "It is *clearly error* in a Court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

The charge of the Court—that plaintiff has made out her cause of action; that the burden of proof was upon the defendant; that the presumption of law was against "suicide or self-destruction,"—was error.

The burden of proof was upon the plaintiff upon the whole case, as made by the pleadings. By its charge, the Court ignored the issue "self-destruction" versus "murder," against both of which there is an equal presumption of law, without telling the jury of the presumption of law against murder, and sent the case to the jury under the instruction that the plaintiff had made a *prima facie* case and repeatedly stated that the burden of proof was upon the defendant—such charge could only have been, and no doubt was, understood by the jury as meaning that if, upon all the evidence, they were in doubt, or if the scales hung evenly balanced, the law presumed the issue in favor of the plaintiff.

Instructions similar to the ones given in the case at bar were considered in the case of Weil v. Globe Indemnity Co., 166 N. Y. Supp. 225, from which opinion we quote:

> "The plaintiff's case was duly established *prima facie,* supported by the well-established presumption that where the cause of death was either accident or suicide, and there *is no evidence explaining* the cause, the law presumes that the death was accidental. The defendant pleaded and undertook to establish as an affirmative defense that the deceased intentionally jumped in front of the train for the purpose of ending his life." * * *
>
> "This direct testimony, however, *cast upon the plaintiff* the burden of meeting defendant's affirmative case, for the rule is, and it is conceded, and was so charged by the trial court, *that the burden* of proof that the death was ac-

cidental is upon the plaintiff, *on the whole case.*"
* * *

"The learned trial justice, however, nullified his charge that the burden of proof on the whole case was with the plaintiff by twice pointedly instructing the jury, in connection with the burden of proof, that:

" 'If the facts are equally susceptible of either construction—that is, suicide on the one hand; accident upon the other—it will be presumed that the death was the result of an accident and not of a wrongful intent.'

"This was tantamount to instructing the jury that, if the evidence was evenly balanced, the law resolved it in favor of the plaintiff. This squarely put upon the defendant the burden of producing a preponderance of evidence, and was directly contrary to the charge that the burden of proof on the whole case was on the plaintiff. As was said in Whitlatch v. Fidelity & Casualty Co., 149 N. Y. 35, 43 N. E. 405, where the issue is so close it is extremely important to have the rules as to the burden of proof correctly given to the jury. These contrary instructions were confusing to say the least, *and could only have been understood by the jury* as meaning that if, upon all the evidence, they were in doubt, or if the scales hung evenly balanced, *the law presumed the issue in favor of the plaintiff.* The Court would have been entirely correct in telling the jury that the presumption of law is against suicide, and that in weighing the evidence they should give due weight to this pre-

sumption; *but a charge that,* where the facts are equally susceptible of either construction, the presumption is that death was the result of an accident *is only appropriate* in cases where the cause of death is unexplained, as, for example, where a man's body is found in a room with a discharged revolver by his side and there *is no other evidence in the case.* The Court confused this rule of presumption, which is available only for the purpose of taking the place of direct testimony, with the burden of proof."

The particular portions of the Court's charge to the jury here complained of are—

"under the evidence in the case, the plaintiff had made out her cause of action entitling her to recover the stipulated amount of insurance, unless that right is found by you to have been defeated by the act of the deceased in taking his own life." * * * (Tr. 291.)

"Suicide or self-destruction, being at variance with the ordinary human instincts, and involving a wrongful act, is never to be presumed, but must be proved or established by evidence sufficiently satisfactory to *overcome the presumption against it,* and to exclude from the minds of the jury every reasonable theory or hypothesis as to the cause of the death of the person involved other than that of self-destruction. The proof is not required to be beyond a reasonable doubt, as in a criminal case, but it must preponderate sufficiently in support of the defense of suicide to *overcome the presumption of the innocence* of the deceased of the wrong

involved in taking his own life, and establish with reasonable certainty that the death was the result of self-destruction, rather than accident, mischance, or violent injury inflicted at the hands of another." * * * Tr. 291.

"The COURT.—Well, that is covered by the charge of the Court when it instructs the jury that *the evidence must enable them to find* that the death was the result of self-destruction, *or of course the plaintiff would be entitled to recover.*

"*The burden,* gentlemen of the jury, *being upon the defendant* to establish its affirmative defense that this death was the result of self-destruction, it follows, as I have heretofore suggested to you—perhaps counsel didn't notice it—that that must be sustained, or satisfy you by the greater weight of the evidence that such was the fact; and if it does not, *if it leaves you in doubt, then, of course, the defendant will not have sustained the burden of proof* by a preponderance of the evidence, *and your verdict will necessarily be for the plaintiff.*" (Tr. 299, 300.)

Lincoln v. French, 105 U. S. 617, the Court says:

"Presumptions are indulged in to supply the place of facts; they are never allowed against ascertained and established facts. When facts appear, presumptions disappear."

Agen v. Metropolitan Life Ins. Co., *supra* (Wis.), 80 N. W. 1020, 1022, the Court says:

"It is said that the legal presumption is that the circumstance which caused Griffin's death

was the result of accident or some outside human agency, and that is true. But it is a rebuttable presumption and easily yields to physical facts clearly inconsistent with it. The highest crime known to the law may be established overcoming the legal presumption of innocence, by circumstantial evidence alone; and so may an essential fact, and more easily, within the rules of law and of reason, in a civil case. What circumstances were there here to support the presumption of accident or outside agency? *None resting in reason, must be the answer.* We say that confidently. Different minds *cannot reasonably* come to different conclusions from the evidence on that subject."

In conclusion, and upon the whole case, we respectfully and most earnestly insist that the Court erred in all and each of the particulars hereinabove specified; that such errors were prejudicial to defendant, and that the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

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